No. 98-1037

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

GEORGE SMITH, Warden, *Petitioner*,

v.

LEE ROBBINS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Anders v. California*, 386 U.S. 738 (1967), this Court held that an indigent criminal appellant could not be denied representation on appeal based on appointed counsel's bare assertion that there was no merit to the appeal. In California, approximately 20 percent of criminal appeals result in the filing of no-merit briefs on behalf of indigent appellants.

1. Did the Ninth Circuit err in finding that California's no-merit brief procedure -- in which appellate counsel who has found no nonfrivolous issues remains available to brief any issues the appellate court might identify -- violated the Sixth Amendment *Anders* right to effective assistance of counsel on appeal?

2. Did the Ninth Circuit err when it ruled that the asserted *Anders* violation required a new appeal, without testing the claimed Sixth Amendment error under *Strickland v. Washington*, 466 U.S. 668 (1984)?

3. Did the Ninth Circuit violate the rule announced in *Teague v. Lane*, 489 U.S. 288 (1989), which prohibits the retroactive application of a new rule on collateral review, when it invalidated California's well-settled, good-faith interpretation of federal law?

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No. ___

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LEE ROBBINS, *Respondent*.

PETITION FOR WRIT OF CERTIORARI

Petitioner George Smith, Warden ("the Warden") respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals appears at Appendix A to the petition and is reported at 152 F.3d 1062 (CA9 1998). The original opinion appears at Appendix B and is reported at 125 F.3d 831 (CA9 1997).

The unreported opinion of the United States District Court appears at Appendix C to the petition. The California Supreme Court's denial orders appear at Appendix D. The California Court of Appeal's unreported affirmance of the prisoner's conviction can be found at Appendix E.

JURISDICTION

The United States Court of Appeals issued an amended opinion on August 13, 1998, and denied the Warden's petition for rehearing on September 24, 1998. This Petition for Writ of Certiorari follows within 90 days. The Warden invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment of the United States Constitution provides, in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code provides in pertinent part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

On December 31, 1988, Robbins shot and killed his former roommate. When he became the focus of the police investigation, Robbins fled in a stolen truck. He was later arrested in Arkansas.

After a trial by jury in Los Angeles Superior Court, Robbins, who had served as his own counsel, was found guilty of second degree murder with personal firearm use and grand theft auto. On September 5, 1990, he was sentenced to state prison for 17 years to life.

Court-appointed counsel on appeal found no nonfrivolous issues to assert and filed a no-merit ("*Wende*") brief setting forth the procedural history and a statement of facts with references to the record and requesting that the California Court of Appeal conduct an independent review of the record. Appendix G; *People v. Wende*, 25 Cal. 3d 436, 158 Cal. Rptr. 839 (Cal. 1979). In an attached declaration counsel averred that he had reviewed the entire record, discussed the case with trial counsel and informed Robbins of his right to request counsel's removal and to file a supplemental brief in propria persona. Appendix G. Robbins then filed a brief on his own behalf, claiming insufficient evidence and due process denial based on the prosecutor's suppression of exculpatory evidence.

On December 12, 1991, after independently examining the record, the appellate court made three findings: that Robbins's counsel had fulfilled his responsibilities, that the record did not support the issues Robbins had raised, and that no arguable issues existed. Appendix E. The California Supreme Court denied Robbins's petition for review.

In late 1992, Robbins filed a federal habeas corpus petition, which was dismissed without prejudice to permit him to exhaust state remedies. On June 11, 1993, Robbins filed a habeas corpus petition in the California Supreme Court, asserting *inter alia* that appellate counsel provided ineffective assistance by filing a no-merit brief. On September 29, 1993, the State Supreme Court denied his petition on the merits.

On February 24, 1994, Robbins filed a federal petition for writ of habeas corpus, alleging ineffective

assistance of counsel for filing a no-merit brief when there were nonfrivolous issues to be raised. In response to the court's order, the Warden filed a return, and Robbins filed a traverse.

On September 8, 1994, the court appointed counsel to represent Robbins and ordered the parties to file supplemental briefing. On October 24, 1995, the district court conditionally granted Robbins's petition for writ of habeas corpus on the ground that appellate counsel was ineffective for failing to meet the standards of *Anders v. California,* 386 U.S. 738 (1967) and ordered Robbins discharged from custody unless the California Court of Appeal accepted jurisdiction over Robbins's direct appeal within 30 days. Appendix C. Both the Warden and Robbins filed notices of appeal.

A Ninth Circuit panel issued a published affirmance, holding that state appellate counsel, who had complied with the state's no-merit procedure, had not complied with the requirements of *Anders*. *Robbins v. Smith*, 125 F.3d 831, amended in 152 F.3d 1062; Appendices A, B.

The panel denied the Warden's petition for rehearing and rejected the suggestion for rehearing en banc but granted the Warden's motions to stay the mandate pending the filing of this petition for writ of certiorari. Appendix F.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT'S IMPROPER RETROACTIVE DEMOLITION OF CALIFORNIA'S NO-MERIT-BRIEF PROCEDURE PORTENDS A SEISMIC DISRUPTION IN THE ADMINISTRATION OF JUSTICE IN THE NATION'S MOST POPULOUS STATE

On May 8, 1967, in *Anders v. California*, this Court invalidated California's no-merit letter procedure for indigent criminal appeals. The Court found that counsel's bare no-merit conclusion, without a finding that an appeal would be frivolous, was an inadequate substitute for counsel's acting in the role of a vigorous advocate on behalf of his indigent client. 386 U.S. 738, 741-42.

Five months later, the California Supreme Court construed and applied *Anders*, finding that a no-merit letter no longer sufficed when counsel could find no arguable issues. *People v. Feggans*, 67 Cal. 2d 444, 447-48, 62 Cal. Rptr. 2d 444 (Cal. 1967). Instead, counsel was required to prepare a brief to assist the court in understanding the facts and legal issues. The brief was to include a statement of facts with citations to the record, a discussion of the legal issues with citations to authority and argument of all arguable issues. *Id*. at 447. If counsel concluded the appeal was frivolous, he could ask to withdraw but would not be permitted to do so until the appellate court was satisfied that he had discharged his duty to his client and the court to provide a statement of the facts and legal issues. Id. If counsel withdrew, the appellant was to be given the opportunity to file a brief in propria persona, after which the court was to decide for itself whether the appeal was frivolous. Id. If any claim was "reasonably arguable," regardless of how the court

believed it would be resolved, the court was obligated to appoint new counsel to argue the appeal. *Id.* at 448.

Twelve years later, in 1979, the California high court refined the state procedure. *People v. Wende*, 25 Cal. 3d at 441-42. The State Supreme Court found that *Anders* was intended to increase protections for indigent no-merit appellants. *Id.* at 441. Accordingly, the reviewing court was required, after reviewing the record, to determine whether the case was wholly frivolous. *Id.* The *Wende* court adopted the *Anders* determination that a brief by counsel was a great improvement over a no-merit letter, because the brief assisted the court by referring to the trial record and legal authorities. *Id.* The court found that neither *Anders* nor *Feggans* required counsel to state explicitly that he had found no arguable issues, because his failure to identify arguable issues could be inferred from his failure to raise any. *Id.* at 442. Counsel did not have to withdraw if he informed his client of the client's right to have him relieved and had not disabled himself by describing the appeal as frivolous. *Id.* The *Wende* court concluded that the filing of a no-merit brief required the appellate court to make an independent review of the record, even if the appellant did not submit a brief in propria persona. *Id.* at 441-442. The court acknowledged that counsel's filing of a no-merit brief might ultimately secure the indigent client a more complete review than the client might receive after a merits brief had been filed. *Id.* at 442.

Over the years, there has been no direct constitutional challenge to the holdings of *Feggans* and *Wende*. Consequently, reasonable California jurists have relied for decades on *Feggans* and *Wende* as correct state-law formulations of the federal constitutional requirements addressed in *Anders*. There has been no reason to question their viability.

In 1997, a three-judge panel (Hug, C.J., with Pregerson and Reinhardt, JJ.) of the Ninth Circuit held

that the *Wende* brief filed on Robbins's behalf did not comply with *Anders* and *Feggans*. Appendix A. The Ninth Circuit's revelation came on collateral review, in a case in which the panel slighted this Court's jurisprudence by deciding the *Teague* point last and without even pretending to survey the legal landscape to determine whether "[the] state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court." *O'Dell v. Netherland*, 521 U.S. 151, 117 S. Ct. 1969, 1973 (1997).

The Ninth Circuit's decision is wrong for three separate reasons. First, California's procedure meets the essential criteria of *Anders v. California*. Second, even though Robbins was never denied counsel, the Ninth Circuit improperly found the asserted error to be prejudicial per se, rather than requiring Robbins to show prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). And third, the panel's opinion violates the anti-retroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989).

A substantial percentage of California's criminal appellate caseload is affected by the Ninth Circuit's decision. In fiscal 1996-97, appellate counsel filed 7,774 opening briefs in direct California criminal and juvenile appeals.[1] Assuming that a previously established ratio of no-merit to merits briefs held true[2], 20 to 24 percent of the total number of criminal appeals were no-merit briefs filed on behalf of indigent appellants, for a state-wide total of more than 1,500 no-merit briefs in that year alone.

Given that scale, the Ninth Circuit's improper retroactive invalidation of California's no-merit brief

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1. 1998 Annual Statistical Report of the Judicial Council of California.

2. *People v. Hackett*, 36 Cal. App. 4th 1297, 1304 n.4, 43 Cal. Rptr. 2d 219 (1995).

procedure threatens to work a grievous hardship on the administration of justice in the nation's largest state. In short, this case does not present just another Ninth Circuit misapplication of *Anders*, *Strickland* and *Teague*. By improperly threatening to dismantle California's no-merit procedure on collateral review, the Ninth Circuit has needlessly jeopardized the finality of thousands of California cases.

ARGUMENT

I.

The Ninth Circuit erred in finding that California's no-merit brief procedure violated the Sixth Amendment right to effective assistance of counsel on appeal

Petitioner contended that he was denied effective assistance of appellate counsel by virtue of counsel's filing a no-merit brief. In a published decision filed on September 23, 1997, and amended on August 13, 1998, the Ninth Circuit panel demolished California's decades-old *Wende* brief procedure. The panel's decision was fundamentally wrong. California's procedure provides greater protections for indigent appellants than the federal Constitution requires. It more than meets the requirements of *Anders*.

In 1985, the California Judicial Council adopted Rule 76.5 of the California Rules of Court. *People v. Hackett*, 36 Cal. App. 4th at 1311. The rule required the state courts of appeal to evaluate the qualifications of appointed counsel so that the attorney's skill corresponded to the length and complexity of the case and authorized the courts to delegate this responsibility to an administrator who had "substantial experience in handling criminal appeals." *Id*. The task has been delegated to five appellate project administrators and their "able and experienced [staff] lawyers."[3] If appointed counsel cannot find any non-frivolous issues, the supervising appellate project attorney searches the record again before authorizing the filing of a no-merit brief. *Id*. And, finally, the court conducts its own independent review. *Id*. In practice, this means that in California an indigent

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3. The California Appellate Project/Los Angeles (CAP/LA) supervised and reviewed the instant case.

Anders appellant is given two independent reviews by counsel and one by the court of appeal. By way of contrast, a defendant represented by retained counsel or appointed counsel filing a merits brief would be entitled to have only his counsel's independent evaluation of the record.

In *Anders v. California*, this Court held "that a criminal appellant may not be denied representation on appeal based on appointed counsel's bare assertion that he or she is of the opinion that there is no merit to the appeal." *Penson v. Ohio*, 488 U.S. 75, 80 (1988). The *Anders* Court acknowledged that an attorney may withdraw without denying the appellant counsel if the withdrawal is preceded by certain safeguards. *Penson*, 488 U.S. at 80. If, after conscientiously examining the record, counsel concludes that the case is wholly frivolous, he may seek leave to withdraw, accompanying his request with a brief which refers to anything in the record which might arguably support an appeal. *Id.* When it receives a no-merit brief, the appellate court has the duty to conduct its own independent examination of the record to see if any nonfrivolous issues exist. If the court agrees with counsel's assessment, it may determine the appeal on the merits without assistance from counsel. *Id.* However, the court is obliged to appoint counsel to argue the appeal if it finds nonfrivolous issues which might be raised. *Id.*

The rule in *Anders* has led to the filing of some strange legal documents, including the "schizophrenic" opening brief in *McCoy v. Court of Appeals of Wisconsin*. *McCoy*, 486 U.S. 429, 432 (1988). This Court held in *McCoy* that appointed counsel's motion to withdraw on grounds that an appeal would be frivolous does not mean that an indigent defendant has been given less effective representation than one who is represented by retained counsel. *Id.* at 437, 438. What *Anders* guarantees an indigent defendant is "a diligent and thorough review of the record and an identification of any arguable issues

revealed by that review." *McCoy*, 486 U.S. at 439. This Court noted that the no-merit brief was not envisioned as a substitute for an advocate's brief on the merits. Instead, the no-merit brief was designed to assist the court in deciding whether the appeal was so frivolous that the criminal appellant did not have a federal constitutional right to counsel. *McCoy*, 486 U.S. at 439-40 n.13.

Thus, the appropriate question for the Ninth Circuit to have asked is whether the state procedure under consideration "is consistent with [the Supreme Court's] holding in *Anders*." *Id.* at 440. The panel decided that it was not. The finding was erroneous.

The California Supreme Court first construed *Anders* in 1967 in *People v. Feggans*, 67 Cal. 2d 444, and further distilled its interpretation in 1979 in *People v. Wende*, 25 Cal. 3d 436. Under those two cases, an indigent California criminal appellant has a right to a brief setting forth a statement of the case and a statement of facts with citations to the transcript, along with counsel's argument in a merits brief of any issues which are arguable. *Wende*, 25 Cal. 3d at 440. If counsel cannot find any nonfrivolous issues to assert, he may limit his brief to a statement of the case and of the facts, a request that the court independently review the record, and an accompanying declaration stating that he has notified his client that the client may seek counsel's removal and may file his own brief in propria persona. *Id.*; *Feggans*, 67 Cal. 2d at 447. Counsel may not argue the case against his client. *Wende*, 25 Cal. 3d at 440. After receiving the brief filed by counsel and considering the brief the appellant might submit, the court must make its own independent review of the record to decide whether the appeal is frivolous. *Wende*, 25 Cal. 3d at 440-42; *Feggans*, 67 Cal. 2d at 447-48. If the court believes that any contention which has been raised is reasonably arguable, it must provide counsel to represent appellant. *Wende*, 25 Cal. 3d at 440; *Feggans*, 67 Cal. 2d at 448.

The California Supreme Court held that *Anders* does not require counsel to state that he has examined the record, found no arguable issues, concluded an appeal would be frivolous and wishes to withdraw. *Wende*, 25 Cal. 3d 442. Counsel's inability to find arguable issues can be inferred from his failure to raise any. *Id*. Nor is it incumbent on counsel to seek to withdraw, so long as he has not disabled himself by describing the case as frivolous. *Id*. The *Wende* court noted there are practical benefits to both court and client from counsel's remaining on the case and found it proper for counsel to remain, so long as he has informed his client of the client's right to request that counsel be relieved and has not called the appeal frivolous. *Id*. The appellate attorney who files a no-merit brief may obtain a more complete review for his client by being unable to identify any nonfrivolous issues than by raising issues, because the court independently reviews the entire record when a no-merit brief is filed. *Id*. at 442.

Petitioner's state appellate counsel filed a brief which meets the mandate of *Anders*, as applied in *Feggans* and *Wende*. Appendix G. The brief contained a two-page statement of the case and a detailed six-page statement of facts, with references to the record, from which the reviewing court could ascertain that counsel had searched the record. *Id*. In addition, counsel requested that the court independently examine the record:

> Pursuant to *People v. Wende* (1979) 25 Cal. 3d 436, counsel requests that this court independently review the entire record on appeal for arguable issues.
>
> Present counsel has advised appellant that appellant may file a supplemental brief with the court within 30 days and may request the court to relieve present counsel. Present counsel remains available to brief any issue(s) upon invitation of the court.

In his state-court declaration in support of the request for an independent review, counsel stated he had reviewed the entire record on appeal, examined the superior court file and exhibits and discussed the case with trial counsel. Appendix G. The attorney also wrote to petitioner, explaining his evaluation of the appellate record and his intention to file a no-merit brief. *Id*. Counsel informed petitioner of his right to file a supplemental brief, sent petitioner the trial transcripts and advised petitioner of his right to have counsel removed. *Id*. Counsel did not withdraw as counsel of record but remained available to brief any issues that the court might identify. *Id*.

Counsel was not required to state that he had examined the record, found no arguable issues, concluded that an appeal would be frivolous and wished to withdraw. *Wende*, 25 Cal. 3d at 442. Counsel's inability to find arguable issues could be inferred from his failure to raise any. *Id*. Nor was it incumbent on counsel to seek to withdraw, so long as he did not disable himself by describing the case as frivolous. *Id*.

In Robbins's case, appointed counsel independently examined the record and found no meritorious issues. Appendix H. The supervising California Appellate Project attorney concurred in his decision and gave him permission to file a no-merit brief. *Id*. In addition, petitioner filed a six-page brief on his own behalf. In his pro per brief, petitioner raised insufficiency

of the evidence and negligent or inadvertent failure of the prosecutor to disclose exculpatory evidence. *Id.* After independently examining the entire record, the state court of appeal found petitioner's counsel had complied with his responsibilities to his client and no arguable issues existed.

The Warden submits that the procedure employed in California provides even greater safeguards than those envisioned in *Anders*.

II.

Where, as in California, the *Anders* appellant is not denied counsel, attorney competence should be measured under *Strickland v. Washington*

As Chief Justice Rehnquist urged in his dissent in *Penson v. Ohio*, the effectiveness of counsel's assistance in an indigent defendant's no-merit appeal should be evaluated in accordance with the *Strickland* test. *Penson*, 488 U.S. 75, 91, citing *Strickland v. Washington*, 466 U.S. at 687-96. This is especially true in a case in which the appellant is actually represented by counsel throughout the pendency of his direct appeal, as is true in California and was untrue in *Penson*.

In *Penson*, counsel was relieved even before the state appellate court determined whether the appeal was meritless. *Id.* at 82. Even worse, the court refused to appoint counsel to represent the appellant after the court had found nonfrivolous issues. *Id.* at 83. The state court's refusal was thus a denial of counsel akin to that which was condemned in *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

In this case, there was no denial of counsel. Rather, appointed state appellate counsel, after investigating the law and the facts, simply found no arguable of-record issues and submitted a no-merit brief in which he set forth a statement of the case and of facts, declared under penalty of perjury that he had reviewed the entire record and informed Robbins of his rights, and asked the court to make an independent review, stating in his accompanying declaration that he had reviewed the entire record and advised Robbins of his rights. The court of appeal was legitimately reassured from the procedural history, summary of the evidence and counsel's declaration that counsel had reviewed the record and was not

submitting a no-merit brief simply out of inertia. On top of that, the California Appellate Project/Los Angeles supervising lawyer and the state appellate court reviewed the record and agreed with his assessment. And still there was more: after examining the record another three times to determine Robbins's petition for review and two petitions for writ of habeas corpus, the California Supreme Court denied him relief. Appendix D. Among the rejected issues was Robbins's claim that appellate counsel was ineffective.

Notwithstanding the state courts' unambiguous finding and without even considering the unfairness or unreliability of the state criminal proceedings, the Ninth Circuit initially invalidated the state appeal on grounds that there were two "arguably nonfrivolous" issues counsel could have raised. Appendix B. In its amended opinion, the panel changed the formulation to "arguable." Appendix A. Even though the panel discarded the "arguably nonfrivolous" formulation in the amended opinion, it persisted in its original conclusion that the claimed error was prejudicial per se. *Id.* The Ninth Circuit's action was akin to invalidating a trial for denial of counsel on grounds of trial counsel's failure to make objections which could have been made, even if making those objections would have made no difference. In effect, the Ninth Circuit substituted *Gideon* for *Strickland*.

If Robbins's counsel had raised a single issue on appeal -- even one so well settled or belied by the record that it was facially ludicrous -- his performance would have been judged in accordance with *Strickland*, which requires a defendant to show prejudice before he can obtain a reversal. There is no rational basis for requiring indigent

appellants whose lawyers raise a single meritless issue to make a greater showing than an indigent appellant whose lawyer has found no issues and is honest enough to say so. But precisely that disparity results from requiring single-issue indigent appellants to show prejudice stemming from appellate counsel's inadequacies and no-merit appellants to obtain per se reversal. Robbins should be required to show that he was prejudiced by counsel's alleged default.

III.

The Ninth Circuit misapplied *Teague v. Lane* when it invalidated California's no-merit brief procedure, because there were reasonable interpretations of *Anders* other than that which Robbins now seeks

The analysis in *Robbins* threatens to demolish California's entire decades-old no-merit brief procedure. That decision is not only wrong on the merits but is also a flagrant violation of this Court's consistent prohibitions against applying a new rule on collateral review. *Teague v. Lane*, 489 U.S. at 299-300.

As this Court has repeatedly recognized in a line of cases beginning with *Teague*, a prisoner must demonstrate to the federal habeas court that he does not seek the retroactive benefit of a new rule of constitutional law, or even a settled rule applied in a novel setting. *O'Dell v. Netherland*, 117 S. Ct. at 1973. When raised by the state, "the court *must* apply *Teague* before considering the merits of the claim." *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (emphasis in original). Because the *Teague* doctrine validates reasonable, good faith interpretations of precedent by state courts, a final state judgment may not be disturbed on federal habeas corpus "unless it can be said that a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court." *O'Dell*, 117 S. Ct. at 1973.

Relief is barred by *Teague* unless, at the time Robbins's conviction became final, every state judge would have felt compelled by existing precedent to conclude that the relief Robbins now seeks was required by the Constitution. *O'Dell*, 117 S. Ct. at 1973. Regardless of contrary authority, the very existence of valid precedents that support the state court's good faith, reasonable

decisions works to preclude the retroactive application of new rules proscribed by *Teague*. *Id.*; *see Sawyer v. Smith*, 497 U.S. 227, 237-38 (1990); *Saffle v. Parks*, 494 U.S. 484, 490 (1990). Where relief on a claim was not "*dictated* by precedent," in the sense that "*no other* interpretation was reasonable," the retroactive application of the rule violates *Teague v. Lane*. *Lambrix v. Singletary*, 520 U.S. 518, 117 S. Ct. 1517, 1530 (1997).

There are three steps in the *Teague* analysis. First, the court must determine when the state conviction became final. Second, the court must survey the legal landscape as it then existed to determine whether a state court considering the claim would have felt compelled by existing precedent to conclude that the rule sought by the state prisoner was required by the Constitution. Third, if the court determines that a petitioner seeks the benefit of a new rule, it must consider whether the rule falls within one of two "narrow exceptions to nonretroactivity." *Lambrix v. Singletary*, 117 S. Ct. at 1525.

Petitioner's conviction was final for purposes of this analysis on January 19, 1993. Rule 13, Rules of the Supreme Court of the United States; *Caspari v. Bohlen*, 510 U.S. at 389. California's no-merit brief procedure had been in place since 1979. *People v. Wende*, 25 Cal. 3d at 441-42.

As discussed in argument I above, after this Court invalidated California's no-merit-letter procedure the California courts construed and applied the rule in *Anders*. *Anders v. California*, 386 U.S. at 741-42; *People v. Feggans*, 67 Cal. 2d at 447-48; *see also People v. Wende*, 25 Cal. 3d at 441-42. Over the years, there has been no direct constitutional challenge to the holdings of *Feggans* and *Wende*. Consequently, reasonable California jurists have relied on *Feggans* and *Wende* as valid declarations of the *Anders* requirements for no-merit briefs in indigent criminal appeals.

Before the Ninth Circuit overturned the state court's reasonable expectations, it was obliged under *Teague* to conduct a survey of the legal landscape at the time Robbins's conviction became final. *O'Dell v. Netherland*, 117 S. Ct. at 1973; *Lambrix v. Singletary*, 117 S. Ct. at 1525-27. Such a survey would have revealed that not all state judges felt constitutionally compelled by existing precedent to reach the result Robbins now seeks.

Although the Ninth Circuit suggests that the analysis in *Penson v. Ohio* is controlling, nothing in *Penson* mandates the result Robbins seeks. Indeed, it is notable that in the years between *Penson* and *Robbins* it does not appear to have occurred to anyone that *Penson* invalidated California's *Wende* procedure. That is not surprising, because *Penson* does not require such an outcome.

In *Penson*, appellate counsel declined to file a brief in a case he believed meritless and instead filed a document which "[bore] a marked resemblance" to the letter brief disapproved in *Anders*. *Penson*, 488 U.S. at 80-81 and 81 n.3. Counsel's no-merit certification erroneously failed to draw attention to anything in the record which might have supported the appeal, leaving the Ohio court with no basis for concluding counsel had performed his duty carefully. *Penson*, 488 U.S. at 81-82. In addition, the Ohio reviewing court erred in granting counsel's request to withdraw from the case before it independently reviewed the record. *Id*. at 82-83. "Most significantly, the Ohio court erred by failing to appoint new counsel to represent petitioner after it had determined that the record supported 'several arguable claims.'" *Id*. at 83. In *Penson*, this Court held that the identification of arguable issues by the Ohio reviewing court "created a constitutional imperative that counsel be appointed[,]" and the error in failing to do so was reversible per se. *Id*. at 84. In California, an indigent appellant is never without counsel.

Nor did the result in *McCoy v. Wisconsin*, 486 U.S. 429, compel state-court judges to jettison California's no-merit brief procedure. In violation of a Wisconsin rule of court which he believed was unethical and contrary to *Anders*, appellate counsel in *McCoy* refused to provide the reasons he believed the appeal baseless and sought to have the rule declared unconstitutional. *McCoy*, 486 U.S. at 432-33. The Wisconsin Supreme Court rejected McCoy's argument, as did this Court. *Id*. at 433-34, 442-43. This Court stated that it did not expect an *Anders* brief to serve as a substitute for an advocate's brief, but only to assist the state reviewing court in deciding whether the appeal is so frivolous that the defendant has no federal constitutional right to counsel. *McCoy*, 486 U.S. at 439 n.13.

Significantly, this Court also explained that whether the state's rule is consistent with *Anders* can only be determined in light of the state Supreme Court's explanation of the rule's requirements. *Id*. at 440. The Warden submits that *McCoy* merely approves Wisconsin's method of handling indigent appeals. It does not purport to discredit other interpretations of *Anders v. California*.

The Ninth Circuit's application of *Teague* has been grudging and superficial. By leaving the *Teague* issue for last, the panel disregarded this Court's admonition that the new-rule issue "*must* apply *Teague* before considering the merits of the claim." *Caspari v. Bohlen*, 510 U.S. at 389 (emphasis in original). Nor did the panel take the trouble to survey the legal landscape as it existed in 1993.

If it had done so, it would have found that the legal landscape validated the reasonableness of California's construction of *Anders*. For example, in Oregon, an appointed attorney who concludes that there are no non-frivolous issues to present "has no mandatory ethical obligation to withdraw from the representation[,]" so long as he himself does not knowingly advance an unwarranted claim. *State v. Balfour*, 311 Or. 434, 814 P.2d

1069, 1078 (Or. 1991). Construing *Anders* in light of *Penson* and *McCoy*, the *Balfour* court concluded it would not further counsel's ability to discharge his ethical obligations to his client and the court if counsel were compelled to file an *Anders* brief "spell[ing] out the potentially limitless variety of 'arguably supportive' issues that counsel can fabricate or discern." *Balfour*, 814 P.2d at 1079. Appellate counsel in Oregon has no obligation to include argument in the brief. *Balfour*, 814 P.2d at 1080.

Likewise, reasonable federal judges could -- and did -- differ on whether California's *Wende* procedure met the mandates of *Anders*. For example, in deciding *Marroquin v. Prunty*, in which another petitioner contemporaneously claimed ineffective assistance of appellate counsel because counsel had filed a *Wende* brief, Judge David Kenyon of the Central District of California did not feel compelled by *Anders* to overturn California's no-merit procedure and in an unpublished decision denied the writ. Appendix I.

The fact that Oregon's *Balfour* decision was part of the legal landscape in 1993 is palpable proof that reasonable jurists would not have felt compelled by existing precedent to rule in petitioner's favor on this claim at the time his conviction became final. *Caspari v. Bohlen*, 510 U.S. 383; *Graham v. Collins*, 506 U.S. 461, 467 (1993). Respondent vigorously asserted this point below, and the Ninth Circuit simply ignored it. The panel's contrary holding relies on a rigid adherence to its own invalid interpretation of *Teague*'s "new rule" language.

As this Court has recently made plain, a rule is new and therefore *Teague*-barred unless the *only* reasonable interpretation is that which the habeas petitioner seeks. *Lambrix v. Singletary*, 117 S. Ct. at 1530. Under this articulation of the *Teague* standard, there can be no doubt that the proposed modification of *Wende* and *Feggans* is a new rule.

The Warden urges this Court to grant certiorari in this case, not only to correct the particular errors made here, but also to signal its determination to vindicate the important comity and finality concerns which have been central to the reform of federal habeas corpus in recent years.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: December 17, 1998.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEE ROBBINS, *Petitioner-Appellee,* v. GEORGE SMITH, Warden, California Department of Corrections, *Respondent-Appellant.*	No. 95-56640 D.C. No. CV-94-01157-GHK
LEE ROBBINS, *Petitioner-Appellant,* v. GEORGE SMITH, *Respondent-Appellee.*	No. 96-55063 D.C. No. CV-94-01157-GHK AMENDED OPINION

Appeals from the United States District Court
for the Central District of California
George H. King, District Judge, Presiding

Argued and Submitted
October 8, 1996—Pasadena, California

Filed September 23, 1997
Amended August 13, 1998

Before: Procter Hug, Jr., Chief Judge, Harry Pregerson and Stephen Reinhardt, Circuit Judges.

Opinion by Chief Judge Hug

SUMMARY

Criminal Law and Procedure/Habeas

The court of appeals affirmed a judgment of the district court in part. The court held that a district court must rule on all exhausted claims of trial error raised in a habeas corpus petition even if the court grants the petition on a claim of ineffective assistance of appellate counsel.

Appellee Lee Robbins represented himself at trial and was convicted of second-degree murder and grand theft auto. Appointed counsel for his state appeal filed a no-merit brief which failed to present any possible grounds for appeal. The brief included a request that the court review the record for arguable issues. Robbins filed a brief on his own behalf.

The California Court of Appeal affirmed Robbins's conviction. The California Supreme Court denied his petition for review.

Robbins filed a federal habeas corpus petition, alleging that his appointed state appellate counsel failed to present his claims in accordance with *Anders v. California*, 386 U.S. 738 (1967). He also raised numerous trial errors.

The district court granted a conditional writ, concluding that at least two non-frivolous issues existed for appeal: (1) the trial court erred in failing to allow Robbins to withdraw the waiver of his right to counsel; and (2) the court failed to provide him with either the money or the means to prepare his own defense.

. The State appealed, contending that appointed counsel's actions satisfied the requirements of *Anders*; the district court erred in basing its grant of Robbins's petition on the finding that at least two arguable issues existed for appeal; and the

application of *Anders* violated *Teague v. Lane*, 489 U.S. 288 (1989).

Robbins cross-appealed, asserting that the district court should have granted relief on his claims of constitutional error in the trial, entitling him to a new trial.

[1] The provisions of the Antiterrorism and Effective Death Penalty Act were not applicable because Robbins filed his petition prior to the Act's effective date.

[2] *Anders* set forth court-appointed appellate counsel's duty to further a client's case after determining the appeal to be without merit. **[3]** Appointed counsel must either provide active and vigorous appellate representation of indigent criminal defendants or, after conducting a conscientious examination of the record and concluding that any appeal would be wholly frivolous, request leave to withdraw and file a brief identifying anything in the record that might arguably support an appeal.

[4] The obligation of the court of appeals was to determine whether appellate counsel met his obligation under *Anders* and its progeny. Robbins's appointed counsel neither provided active and vigorous appellate representation, nor complied with *Anders*. The brief filed on Robbins's behalf completely failed to identify any grounds that arguably supported an appeal. Accordingly, the district court correctly found that Robbins's counsel did not comply with *Anders*.

[5] *Anders* creates a very low threshold for which arguments counsel must brief for the court. Counsel must bring to the court's attention anything in the record that might arguably support the appeal. **[6]** The two issues identified by the district court were arguable and should have caused the state appellate court to appoint new counsel for Robbins.

[7] *Teague* held that new constitutional rules cannot be applied retroactively to cases on collateral review unless they

fall into one of two narrow exceptions. The district court's holding did not involve a new rule. The facts of Robbins's case almost directly mirrored those of *Anders*. Accordingly, no "new" constitutional rule was invoked.

[8] Had Robbins not raised the *Anders* issue, the district court would have reached the merits of Robbins's claims of constitutional error at trial. Had the district court ruled in Robbins's favor on them, a grant of habeas relief would have required either release or a new trial.

[9] The district courts have been directed to rule on all claims raised in a petition for habeas corpus, even if the petition is granted on one. **[10]** Granting the writ only for the ineffective assistance of counsel on appeal leaves the challenges underlying the conviction unresolved. This can cause grave injustices to defendants who must await resolution of a renewed appeal while potentially deserving a retrial and possibly an acquittal. **[11]** Robbins was entitled to have trial issues considered just as any other habeas petitioner would. That Robbins also presented an allegation of ineffective assistance of appellate counsel was a secondary issue that would come into play only if the district court were to deny relief for trial errors. That appeal would be a renewal of the direct appeal, and could encompass any issues that could have been raised on direct appeal.

[12] Because the district court addressed the appellate claims and decided them correctly, it was in the interest of judicial economy and efficiency to affirm them. If trial error were found to have occurred and required vacation of the conviction, the appellate errors would become immaterial. If no such trial errors were found, the district court's original order would again become applicable.

COUNSEL

Carol Frederick Jorstad, Deputy Attorney General, Los Angeles, California, for the respondent-appellant-cross-appellee.

Elizabeth A. Newman and Ronald J. Nessim, Bird, Marella, Boxer, Wolpert & Matz, Los Angeles, California, for the petitioner-appellee-cross-appellant.

OPINION

HUG, Chief Judge:

Robbins was convicted in California state court of second-degree murder and grand theft auto. His petition for habeas corpus alleges that his rights under the United States Constitution were violated because of constitutional errors in his trial and also because of ineffective assistance of counsel in his direct appeal. The district court held that Robbins was denied effective assistance of counsel on appeal because of the failure of his appointed counsel to comply with the minimum requirements of *Anders v. California*, 386 U.S. 738 (1967). The district court did not reach the exhausted issues set forth in Robbins' petition concerning the alleged violation of his constitutional rights at the trial stage. The district court's order would only require that Robbins be afforded an opportunity to appeal his conviction with the aid of effective counsel.

We have jurisdiction pursuant to 28 U.S.C. § 2253 and we affirm the district court's granting of Robbins's habeas petition on the *Anders* issue. We remand, however, to the district court for consideration of the alleged constitutional violations at trial that have been properly exhausted in the state courts. We hold that Robbins is entitled to consideration of these issues at this time. If the petition is granted on any of those grounds, it would obviate the necessity for an appeal. If the petition is denied on those grounds, the new appeal in the state court as required by the district court order would, of course, not be confined to exhausted issues, but would be a renewed direct appeal.

I. *FACTS AND PRIOR PROCEEDINGS*

Lee Robbins, an indigent defendant, represented himself at trial, where he was convicted of second-degree murder and grand theft auto. He was sentenced to seventeen years to life in the California state prison on September 5, 1990.

Robbins received appointed counsel for his state appeal. His attorney filed a no-merit brief before the court, which briefly outlined the facts surrounding Robbins's trial and failed to present any possible grounds for appeal. Included in the short document was a request that the court itself review the record for arguable issues. Counsel pledged to remain "available to brief any [issue(s)] upon invitation of the court."

Robbins subsequently filed a brief on his own behalf. After the California Court of Appeals found Robbins's claims to be unsupported by the record and that no other arguable issues existed, his appeal was denied on December 12, 1991. Robbins's petition for review by the California Supreme Court was denied on October 21 of the following year.

After exhausting his state remedies on January 26, 1994,[1] Robbins filed, pursuant to 28 U.S.C. § 2254, an amended first federal habeas petition on February 24, 1994. He argued that his appointed state appellate counsel failed to present his claims in accordance with *Anders v. California*, 386 U.S. 738 (1967). He also raised numerous trial errors, among them: (1) that the prosecutor had violated his duty to disclose exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963); (2) that the court had erred in failing to allow Robbins to withdraw the waiver of his right to counsel; (3) that the court had failed to provide him with either the money or the means to prepare a case in his own defense; and (4) that the court

[1]Robbins filed a habeas petition in state court, which the California Supreme Court ultimately denied on the merits. The petition raised the same issues that Robbins now raises in his federal habeas petition.

had deprived him of his right to a fair trial by failing to secure the presence of the witnesses he had subpoenaed.

After counsel was appointed to represent Robbins, and after several rounds of supplemental briefing, the district court granted his habeas petition on October 24, 1995, "to the extent that petitioner shall be discharged from custody unless the California Court of Appeal accepts jurisdiction over petitioner's direct appeal within 30 days." The State of California appealed. Robbins cross-appealed, arguing that the district court should have granted relief on his claims of constitutional error in the trial, thereby entitling him to a new trial.

II. *Applicability Of AEDPA*

[1] As a threshold matter, we must decide whether the new substantive and procedural requirements of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), signed into law on April 24, 1996, are applicable to this case. Though the answer to the question was not clear at the time of oral argument, the Supreme Court has since held that the sections of AEDPA relevant to this case do not apply to cases filed in the federal courts prior to the Act's effective date of April 24, 1996. *See Lindh v. Murphy*, 117 S. Ct. 2059, 2068 (1997); *see also Jeffries v. Wood*, 103 F.3d 827, 827 (9th Cir. 1996). Robbins filed his § 2254 petition in the district court in February 1994. Thus, the provisions of AEDPA do not apply to this petition.

III. *The State's Appeal*

The district court held that Robbins's representation during his direct appeal was ineffective under *Anders v. California*, 386 U.S. 738 (1967). It was on this basis that the district court granted a conditional writ of habeas corpus. The State appeals that order, arguing (1) that the brief filed by Robbins's appointed counsel complied with *Anders* as interpreted by the California Supreme Court, (2) that the district court erred in

finding that arguable issues existed, and (3) that the applica tion of *Anders* violates *Teague v. Lane*, 489 U.S. 288 (1989 We address each of these arguments below.

[2] *Anders* is the Supreme Court's landmark pronounce ment setting forth court-appointed appellate counsel's duty t further a client's case after determining the appeal to be with out merit. *Anders* involved the situation where an indiger defendant's appointed counsel, after concluding an appea was frivolous, filed a letter brief so informing the court. Th letter noted that counsel remained at the court's disposal t brief any issues that the court were to see fit. The defendant' request for replacement counsel was denied, and the Califor nia Court of Appeals affirmed the conviction.

Anders subsequently filed a federal habeas petition, arguin that his right to effective counsel on appeal had been violated The Supreme Court agreed. The Court was convinced that th appellate court reviewed Anders's claim without the benef of briefing or advocacy based on "counsel's bare conclusion" that the appeal was frivolous. *Anders*, 386 U.S. at 742. Th Court held that such a letter brief from defendant's counse " 'cannot be an adequate substitute for the right to full appel late review.' " *Id.* (quoting *Eskridge v. Washington State Bd.* 357 U.S. 214, 215 (1958)).

The Court in *Anders* outlined the appropriate procedure a follows:

> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*. The no-merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court — not counsel — then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

Anders, 386 U.S. at 744.

[3] In *Penson v. Ohio*, the Supreme Court explained that "*Anders*, in essence, recognizes a limited exception to the requirement articulated in [*Douglas v. California*, 372 U.S. 353 (1963)] that indigent defendants receive representation on their first appeal as of right." *Penson v. Ohio*, 488 U.S. 75, 83 (1988). This limited exception recognizes that the Fourteenth Amendment does not demand that a State require that appointed counsel pursue wholly frivolous appeals. *Id.* at 83-84. *Anders* and *Douglas* thus set forth the exclusive procedure through which appointed counsel's performance can pass constitutional muster: Appointed counsel must either provide active and vigorous appellate representation of indigent criminal defendants or, after conducting a conscientious examination of the record and concluding that any appeal would be wholly frivolous, request leave to withdraw and file a brief identifying anything in the record that might arguably support

an appeal. *See Anders*, 386 U.S. at 744; *see also Penson*, 488 U.S. at 80, 83-84.

The California Supreme Court interpreted *Anders* in *People v. Feggans*, 67 Cal. 2d 444, 432 P.2d 21 (1967), and later in *People v. Wende*, 25 Cal. 3d 436, 600 P.2d 1071 (1979). *Wende* quoted *Feggans* as stating the appropriate rule establishing the duty of counsel:

> In *People v. Feggans* (1967) 67 Cal.2d 444, 62 Cal. Rptr. 419, 432 P.2d 21, we responded to the Supreme Court's mandate as follows: "Under *Anders*, regardless of how frivolous an appeal may appear . . ., a no-merit letter will not suffice. Counsel must prepare a brief to assist the court in understanding the facts and the legal issues in the case. The brief must set forth a statement of the facts with citations to the transcript, discuss the legal issues with citations of appropriate authority, and argue all issues that are arguable. . . . If counsel concludes that there are no arguable issues and the appeal is frivolous, he may limit his brief to a statement of the facts and applicable law and may ask to withdraw from the case, but he must not argue the case against his client. Counsel is not allowed to withdraw from the case until the court is satisfied that he has discharged his duty to the court and his client to set forth adequately the facts and issues involved. If counsel is allowed to withdraw, defendant must be given an opportunity to present a brief, and thereafter the court must decide for itself whether the appeal is frivolous. [Citations.] If any contention raised is reasonably arguable, no matter how the court feels it will probably be resolved, the court must appoint another counsel to argue the appeal. (*People v. Feggans, supra*, 67 Cal.2d at 447-48, 62 Cal.Rptr. at 421, 432 P.2d at 23)."

Wende, 600 P.2d at 1073-74.

The State contends that, because Robbins's state appellate counsel's brief complies with the strictures of *Wende*, the district court erred in determining the brief to be insufficient under *Anders*. The State argues that appointed counsel's actions in this case satisfy the requirements of *Anders*, as construed by *Feggans* and *Wende*, because: (1) the nonexistence of arguable issues should have been inferred from counsel's failure to raise any; and (2) despite the fact that it should have been inferred that counsel concluded that there was a lack of arguable issues, it was not incumbent on him to withdraw because he had not "disabled himself from effectively representing" Robbins by describing his case as frivolous. *See Wende*, 600 P.2d at 1075.

[4] Our obligation in this habeas action is to determine whether appellate counsel met his obligations under the United States Supreme Court's requirements set forth in *Anders* and its progeny.[2] It is apparent that those requirements were not met. Robbins's appointed counsel neither provided active and vigorous appellate representation nor complied with *Anders* and *Feggans*. The brief filed on Robbins's behalf completely failed to identify any grounds that arguably supported an appeal. Rather, it briefly summarized the procedural and historical facts of the case and requested that the state appellate court "independently review the entire record for arguable issues." Accordingly, the district court correctly found that Robbins's counsel did not comply with *Anders*.

The State also argues that the district court erred in basing its grant of Robbins's habeas petition on the finding that at least two arguable issues existed for appeal. In making this

[2]We only address the obligations of appellate counsel in this decision. Our opinion in no way relieves the state court judges of their obligation under *Anders* and *Wende* to conduct their own independent review of the proceedings to decide whether the appeal is wholly frivolous.

argument, the State assumes that the nonexistence of arguable issues would render appointed counsel's failure to comply with *Anders* harmless. We need not decide whether this assumption is correct because we conclude that the district court correctly determined that arguable issues existed.

The district court found that at least two nonfrivolous appellate issues existed in Robbins's case: (1) that the denial of Robbins's attempt to withdraw the waiver of his right to counsel constituted error; and (2) that the inadequacy of the county jail's library deprived him of a meaningful opportunity to prepare his defense. It further noted that there may well be other arguable issues. Robbins also points to several other exhausted, arguable appellate issues, including prosecutorial misconduct in violation of *Brady v. Maryland*, wrongful denial of Robbins's *Marsden* motions (motions under California law relating to the substitution of counsel), and interference with Robbins's constitutional right to prepare an adequate defense on his own behalf.

[5] *Anders* creates a very low threshold for which arguments counsel must brief for the court. *See United States v. Griffy*, 895 F.2d 561, 563 (9th Cir. 1990); *Lombard v. Lynaugh*, 868 F.2d 1475, 1487 (5th Cir. 1989) (Goldberg, J., concurring). Certainly, counsel need not argue only "winning" arguments. Instead, counsel must bring to the court's attention "anything in the record that might arguably support the appeal." *Anders*, 386 U.S. at 744. For purposes of California law, an issue is "arguable" when it has some potential for success, meaning some possibility of a result requiring reversal or modification of the judgment. *People v. Johnson*, 123 Cal. App. 3d 106, 109 (1981).

[6] The two issues identified by the district court — (1) whether the denial of Robbins's attempt to withdraw the waiver of his right to counsel constituted error; and (2) whether the inadequacy of the county jail's library deprived him of a meaningful opportunity to prepare his defense — are

arguable and should have caused the state appellate court to appoint new counsel for Robbins.[3] As noted by the district court:

> The right guaranteed by the Fourteenth and Sixth Amendments to waive one's right to counsel and proceed in pro per "is premised upon the right of the defendant to make a defense." *Milton v. Morris*, 767 F.2d 1443, 1445-46 (9th Cir. 1985) (citing *Faretta v. California*, 422 U.S. 806, 819-20 (1975)). An incarcerated defendant cannot meaningfully exercise this right without access to tools such as law books. *Id.* at 1446; *Taylor v. List*, 880 F.2d 1040, 1047 (9th Cir. 1989).

The California trial judge's own words — "it's almost impossible as a pro per to prepare yourself a decent defense, especially given the law library" — justify the district court's conclusion that Robbins's inability to prepare an adequate defense was, in the very least, an arguable issue. The California trial judge even told Robbins that "if you are looking up law, you are not going to be able to find it because somebody has torn it out before you got there." There is some potential, had Robbins's appointed counsel raised and vigorously advanced this issue on appeal, that Robbins's conviction would have been reversed.

As the district court noted, the California trial court's treatment of Robbins's request to withdraw his waiver of his right to counsel also raises a serious constitutional question. The district court stated, "[f]airly read, petitioner asked for the appointment of counsel as an alternative to advisory counsel. Because the judge failed to even consider whether petitioner was reasserting his right to counsel, it too is a nonfrivolous

[3]Because we conclude that the district court correctly identified at least two arguable issues, we need not determine whether other arguable issues exist.

issue which should have been raised by petitioner's appellate counsel." We agree.

[7] Finally, the State argues that granting relief on Robbins's *Anders* claim violates *Teague v. Lane*. *Teague* held that new constitutional rules cannot be applied retroactively to cases on collateral review unless they fall into one of two narrow exceptions. It is clear, however, that the district court's holding in this case did not involve a new rule. Our discussion above indicates that the outcome of Robbins's case was predetermined by the controlling analysis provided by the Supreme Court in *Anders* and *Penson*, both of which were handed down before Robbins's conviction. Likewise, the California Supreme Court's decision in *Feggans*, which is cited approvingly in *Wende*, compels the result in this case and was decided before Robbins's conviction. The consequences of counsel's failure to raise arguable issues were unambiguously detailed in *Anders* and *Feggans*. Application of *Anders* and *Feggans* to this case required no extension of precedent or logical interpolation. The facts of Robbins's case almost directly mirror those of *Anders*. Accordingly, no "new" constitutional rule was invoked in this case.

IV. *Robbins's Cross-Appeal*

Robbins argues in his cross-appeal that the district court erred when it failed to consider and to rule upon his allegations of constitutional error in the state court trial.

[8] Robbins brought eleven exhausted claims in the district court relating to his trial. Had Robbins not raised the *Anders* issue, the district court would have reached the merits of those claims. Had the district court ruled in Robbins's favor on them, a grant of habeas relief would have required either release or a new trial. The need for a new direct appeal — the remedy granted by the district court — would be obviated by this outcome. Robbins is entitled to have these foundational claims in his habeas petition considered first.

[9] The Eleventh Circuit has, in the exercise of its supervisory authority, directed district courts to rule on all claims raised in a petition for habeas corpus, even if the petition is granted on one claim. *Clisby v. Jones*, 960 F.2d 925, 936 (11th Cir. 1992) (en banc). This has the advantage of avoiding possible remands for consideration of remaining claims if the district court's decision on one claim is reversed. It has the disadvantage of requiring considerable extra work by the district court to decide many claims that may be completely unnecessary, because they will be mooted on appeal.

[10] We have taken a different approach in our circuit. In *Blazak v. Ricketts*, 971 F.2d 1408, 1413 (9th Cir. 1992) (per curiam), we declined to apply the *Clisby* approach to a capital case in which the district court granted the writ on one guilt phase issue without deciding all the remaining guilt phase issues or any of the penalty phase issues. We drew a distinction, however, between a case which granted a petition on a sentencing issue but left unresolved an issue affecting the validity of the conviction. *Id.* at 1413-14. We stated:

> Moreover, unlike habeas grants exclusively on sentencing issues, the grant of a habeas petition because of the constitutional invalidity of a conviction raises concerns that a possibly innocent person has been unjustifiably incarcerated on death row for a number of years. Delaying retrial in such cases, while attorneys fight over a sentence that may no longer exist, risks the perpetuation of a monumental injustice, should retrial ultimately result in an acquittal.

Id. at 1414 n.7. The same policy considerations are involved in this case. Granting the writ only for the ineffective assistance of counsel on appeal leaves the challenges underlying the conviction unresolved. Resolving other issues while leaving challenges to the underlying conviction unresolved potentially can cause grave injustice to defendants like Robbins who, despite alleging constitutional shortcomings in the trial

process, must await resolution of a renewed appeal while potentially deserving a retrial and possibly an acquittal.

Penson v. Ohio, cited by California in opposition to Robbins's claim, is inapposite. Penson was an indigent defendant who was convicted of several serious felonies. His appointed appellate counsel filed a letter brief certifying his appeal to be meritless and asking to withdraw. In violation of *Anders*, the Ohio Court of Appeals allowed counsel to withdraw and conducted its own review of the record without the benefit of advocacy or briefing. *Penson*, 488 U.S. at 78. The Ohio court found "several arguable claims," reversed one of his convictions, and then dismissed his appeal. *Id.* at 79. Penson petitioned for a writ of certiorari. The Supreme Court granted the petition and reversed.

[11] *Penson* is unlike the case at bar because it involved the Supreme Court's review of the Ohio appellate court's dismissal of Penson's direct appeal. When the Court recognized that "several arguably meritorious grounds for reversal" existed, it remanded the matter to the Ohio appellate court for further proceedings. *Id.* It was, however, reviewing the direct appeal of a state court action, and not a habeas petition. In this circumstance, the Court explained that it would not "sit in place of the Ohio Court of Appeals *in the first instance* to determine whether petitioner was prejudiced as to any appellate issue." *Id.* at 87 n.9 (emphasis added). In this habeas proceeding the district court will be considering alleged constitutional errors in the defendant's trial that have been exhausted in the state court. Robbins is entitled to have those trial issues considered at this time just as any other habeas petitioner would. The fact that Robbins also presents an allegation of ineffective assistance of appellate counsel is a secondary issue that comes into play only if the district court denies relief for trial errors. That appeal would then be a renewal of the direct appeal as in *Penson* and could encompass any issues that could have been raised on direct appeal.

[12] Because the district court should have addressed the claims of trial error first, it might not have needed to address Robbins's claims of appellate error as well. Because it did address the appellate claims, however, and because it decided those questions correctly, it is in the interest of judicial economy and efficiency to affirm them now. If trial error is found to have occurred and to require vacation of the conviction, the appellate errors will become immaterial. If no such trial errors are found, however, the district court's original order will again become applicable. *Cf. Penson*, 488 U.S. at 88-89 (the actual or constructive denial of assistance of counsel is presumed to result in prejudice); *Lombard*, 868 F.2d at 1487 (formal physical presence of appellate attorney is not appellate counsel; defendant constructively denied assistance of counsel where attorney filed document containing no arguments going to merits of appeal).

V. *CONCLUSION*

The judgment of the district court is **AFFIRMED IN PART** but the case is **REMANDED** to the district court for consideration of whether the alleged constitutional trial errors that defendant raises merit reversal of Robbins's underlying convictions and the granting of a new trial.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEE ROBBINS,
Petitioner-Appellee,
v.
GEORGE SMITH, Warden, California Department of Corrections,
Respondent-Appellant.

No. 95-56640
D.C. No.
CV-94-01157-GHK

LEE ROBBINS,
Petitioner-Appellant,
v.
GEORGE SMITH,
Respondent-Appellee.

No. 96-55063
D.C. No.
CV-94-01157-GHK
OPINION

Appeals from the United States District Court
for the Central District of California
George H. King, District Judge, Presiding

Argued and Submitted
October 8, 1996—Pasadena, California

Filed September 23, 1997

Before: Procter Hug, Jr., Chief Judge, Harry Pregerson and Stephen Reinhardt, Circuit Judges.

Opinion by Chief Judge Hug

SUMMARY

Criminal Law and Procedure/Habeas

The court of appeals affirmed in part a judgment of the district court and remanded. The court held that district courts must rule on all claims raised in a petition for habeas corpus, even if the petition is granted on one claim to avoid injustice to a petitioner potentially deserving a retrial and possibly an acquittal.

Appellee Lee Robbins represented himself at trial and was convicted of second-degree murder and grand theft auto. Appointed counsel for his state appeal filed a no-merit brief which failed to present any possible grounds for appeal. The brief included a request that the court review the record for arguable issues. Robbins filed a brief on his own behalf.

The state court of appeals denied Robbins's appeal. His petition for review by the state supreme court was also denied.

Robbins filed a federal habeas corpus petition, alleging that his appointed state appellate counsel failed to present his claims in accordance with *Anders v. California*, 386 U.S. 738 (1967). He also raised numerous trial errors.

The district court granted a conditional writ of habeas corpus, finding that at least two non-frivolous issues existed for appeal: (1) the trial court erred in failing to allow Robbins to withdraw the waiver of his right to counsel; and (2) the court failed to provide him with either the money or the means to prepare his own defense.

The government appealed, arguing that appointed counsel's actions satisfied the requirements of *Anders*; the district court erred in basing its grant of Robbins's petition on the finding that at least two arguable issues existed for appeal; and the

application of *Anders* violated *Teague v. Lane*, 489 U.S. 288 (1989).

Robbins cross-appealed, arguing that the district court should have granted relief on his claims of constitutional error in the trial, entitling him to a new trial.

[1] The provisions of the Antiterrorism and Effective Death Penalty Act were not applicable because Robbins filed his petition prior to the Act's effective date.

[2] *Anders* is the Supreme Court's landmark pronouncement setting forth court-appointed appellate counsel's duty to further a client's case after determining the appeal to be without merit. **[3]** The Fourteenth Amendment does not demand that appointed counsel pursue wholly frivolous appeals; however, under *Anders*, appointed counsel must either provide active and vigorous appellate representation of indigent criminal defendants or, after conducting a conscientious examination of the record and concluding that any appeal would be wholly frivolous, request leave to withdraw and file a brief identifying anything in the record that might arguably support an appeal.

[4] Robbins's appointed counsel neither provided active and vigorous appellate representation, nor complied with *Anders*.

[5] *Anders* creates a very low threshold for which arguments counsel must brief for the court. Counsel must bring to the court's attention anything in the record that might arguably support the appeal. **[6]** The two issues identified by the district court were arguably non-frivolous and should have caused the state to appoint new counsel for Robbins.

[7] In *Teague*, the Supreme Court held that new constitutional rules cannot be applied retroactively to cases on collateral review unless they fall into one of two narrow exceptions.

A case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.

[8] The district court's holding did not involve a new rule. The outcome of Robbins's case was predetermined by the Supreme Court's analysis in *Anders*, which was handed down before Robbins's conviction.

[9] Had Robbins not raised the *Anders* issue, the district court would have reached the merits of Robbins's claims of constitutional error at trial. Had the district court ruled in Robbins's favor on them, a grant of habeas relief would have required either release or a new trial.

[10] The district courts have been directed to rule on all claims raised in a petition for habeas corpus, even if the petition is granted on one. **[11]** Granting the writ only for the ineffective assistance of counsel on appeal leaves the challenges underlying the conviction unresolved. This can cause grave injustices to defendants who must await resolution of a renewed appeal while potentially deserving a retrial and possibly an acquittal. **[12]** Remand was required for the district court to consider Robbins's claims of constitutional error at trial.

COUNSEL

Carol Frederick Jorstad, Deputy Attorney General, Los Angeles, California, for the respondent-appellant-appellee.

Elizabeth A. Newman and Ronald J. Nessim, Bird, Marella, Boxer, Wolpert & Matz, Los Angeles, California, for the petitioner-appellee-appellant.

OPINION

HUG, Chief Judge:

Robbins was convicted in California state court of second-degree murder and grand theft auto. His petition for habeas corpus alleges that his rights under the United States Constitution were violated because of constitutional errors in his trial and also because of ineffective assistance of counsel in his direct appeal. The district court held that Robbins was denied effective assistance of counsel on appeal because of the failure of his appointed counsel to comply with the minimum requirements of *Anders v. California*, 386 U.S. 738 (1967). The district court did not reach the exhausted issues set forth in Robbins' petition concerning the alleged violation of his constitutional rights at the trial stage. The district court's order would only require that Robbins be afforded an opportunity to appeal his conviction with the aid of effective counsel.

We have jurisdiction pursuant to 28 U.S.C. § 2253 and we affirm the district court's granting of Robbins's habeas petition on the *Anders* issue. We remand, however, to the district court for consideration of the alleged constitutional violations at trial that have been properly exhausted in the state courts. We hold that Robbins is entitled to consideration of these issues at this time. If the petition is granted on any of those grounds, it would obviate the necessity for an appeal. If the petition is denied on those grounds, the new appeal in the state court as required by the district court order would, of course, not be confined to exhausted issues, but would be a renewed direct appeal.

I. *FACTS AND PRIOR PROCEEDINGS*

Lee Robbins, an indigent defendant, represented himself at trial, where he was convicted of second-degree murder and

grand theft auto. He was sentenced to seventeen years to life in the California state prison on September 5, 1990.

Robbins received appointed counsel for his state appeal. His attorney filed a no-merit brief before the court, which briefly outlined the facts surrounding Robbins's trial and failed to present any possible grounds for appeal. Included in the short document was a request that the court itself review the record for arguable issues. Counsel pledged to remain "available to brief any [issue(s)] upon invitation of the court."

Robbins subsequently filed a brief on his own behalf. After the California Court of Appeals found Robbins's claims to be unsupported by the record and that no other arguable issues existed, his appeal was denied on December 12, 1991. Robbins's petition for review by the California Supreme Court was denied on October 21 of the following year.

After exhausting his state remedies on January 26, 1994,[1] Robbins filed, pursuant to 28 U.S.C. § 2254, an amended first federal habeas petition on February 24, 1994. He argued that his appointed state appellate counsel failed to present his claims in accordance with *Anders v. California*, 386 U.S. 738 (1967). He also raised numerous trial errors, among them: (1) that the prosecutor had violated his duty to disclose exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963); (2) that the court had erred in failing to allow Robbins to withdraw the waiver of his right to counsel; (3) that the court had failed to provide him with either the money or the means to prepare a case in his own defense; and (4) that the court had deprived him of his right to a fair trial by failing to secure the presence of the witnesses he had subpoenaed.

After counsel was appointed to represent Robbins, and after

[1]Robbins filed a habeas petition in state court, which the California Supreme Court ultimately denied on the merits. The petition raised the same issues that Robbins now raises in his federal habeas petition.

several rounds of supplemental briefing, the district court granted his habeas petition on October 24, 1995, "to the extent that petitioner shall be discharged from custody unless the California Court of Appeal accepts jurisdiction over petitioner's direct appeal within 30 days." The State of California appealed. Robbins cross-appealed, arguing that the district court should have granted relief on his claims of constitutional error in the trial, thereby entitling him to a new trial.

II. *Applicability Of AEDPA*

[1] As a threshold matter, we must decide whether the new substantive and procedural requirements of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), signed into law on April 24, 1996, are applicable to this case. Though the answer to the question was not clear at the time of oral argument, the Supreme Court has since held that the sections of AEDPA relevant to this case do not apply to cases filed in the federal courts prior to the Act's effective date of April 24, 1996. *See Lindh v. Murphy*, 117 S. Ct. 2059, 2068 (1997); *see also Jeffries v. Wood*, 103 F.3d 827, 827 (9th Cir. 1996). Robbins filed his § 2254 petition in the district court in February 1994. Thus, the provisions of AEDPA do not apply to this petition.

III. *The State's Appeal*

The district court held that Robbins's representation during his direct appeal was ineffective under *Anders v. California*, 386 U.S. 738 (1967). It was on this basis that the district court granted a conditional writ of habeas corpus. The State appeals that order, arguing (1) that the brief filed by Robbins's appointed counsel complied with *Anders* as interpreted by the California Supreme Court, (2) that the district court erred in finding that arguably nonfrivolous issues existed, and (3) that the application of *Anders* violates *Teague v. Lane*, 489 U.S. 288 (1989). We address each of these arguments below.

[2] *Anders* is the Supreme Court's landmark pronouncement setting forth court-appointed appellate counsel's duty to further a client's case after determining the appeal to be without merit. *Anders* involved the situation where an indigent defendant's appointed counsel, after concluding an appeal was frivolous, filed a letter brief so informing the court. The letter noted that counsel remained at the court's disposal to brief any issues that the court were to see fit. The defendant's request for replacement counsel was denied, and the California Court of Appeals affirmed the conviction.

Anders subsequently filed a federal habeas petition, arguing that his right to effective counsel on appeal had been violated. The Supreme Court agreed. The Court was convinced that the appellate court reviewed Anders's claim without the benefit of briefing or advocacy based on "counsel's bare conclusion" that the appeal was frivolous. *Anders*, 386 U.S. at 742. The Court held that such a letter brief from defendant's counsel " 'cannot be an adequate substitute for the right to full appellate review.' " *Id.* (quoting *Eskridge v. Washington State Bd.*, 357 U.S. 214, 215 (1958)).

[3] In *Penson v. Ohio*, the Supreme Court explained that "*Anders*, in essence, recognizes a limited exception to the requirement articulated in [*Douglas v. California*, 372 U.S. 353 (1963)] that indigent defendants receive representation on their first appeal as of right." *Penson v. Ohio*, 488 U.S. 75, 83 (1988). This limited exception recognizes that the Fourteenth Amendment does not demand that a State require that appointed counsel pursue wholly frivolous appeals. *Id.* at 83-84. *Anders* and *Douglas* thus set forth the exclusive procedure through which appointed counsel's performance can pass constitutional muster: Appointed counsel must either provide active and vigorous appellate representation of indigent criminal defendants or, after conducting a conscientious examination of the record and concluding that any appeal would be wholly frivolous, request leave to withdraw and file a brief identifying anything in the record that might arguably support an appeal. *See Anders*, 386 U.S. at 744; *see also Penson*, 488 U.S. at 80, 83-84.

The California Supreme Court interpreted *Anders* in *People v. Feggans*, 67 Cal. 2d 444, 432 P.2d 21 (1967), and later in *People v. Wende*, 25 Cal. 3d 436, 600 P.2d 1071 (1979). The State contends that, because Robbins's state appellate counsel's brief complies with the strictures of *Wende*, the district court erred in determining the brief to be insufficient under *Anders*. The State argues that appointed counsel's actions in this case satisfy the requirements of *Anders*, as construed by *Feggans* and *Wende*, because: (1) the nonexistence of arguable issues should have been inferred from counsel's failure to raise any; and (2) despite the fact that it should have been inferred that counsel concluded that there was a lack of arguable issues, it was not incumbent on him to withdraw because he had not "disabled himself from effectively representing" Robbins by describing his case as frivolous. *See Wende*, 600 P.2d at 1075.

[4] Accepting the State's contention, that the state court decision in *Wende* allows a departure from the strict requirements of *Anders*, would override Supreme Court precedent. Our obligation in this habeas action is to determine whether appellate counsel met his obligations under the United States Supreme Court's requirements set forth in *Anders* and its progeny. It is apparent that those requirements were not met. Robbins's appointed counsel neither provided active and vigorous appellate representation nor complied with *Anders*. The brief filed on Robbins's behalf completely failed to identify any grounds that arguably supported an appeal. Rather, it briefly summarized the procedural and historical facts of the case and requested that the state appellate court "independently review the entire record for arguable issues." Accordingly, the district court correctly found that Robbins's counsel did not comply with *Anders*.

The State also argues that the district court erred in basing its grant of Robbins's habeas petition on the finding that at

least two arguable issues existed for appeal. In making this argument, the State assumes that the nonexistence of arguable issues would render appointed counsel's failure to comply with *Anders* harmless. We need not decide whether this assumption is correct because we conclude that the district court correctly determined that arguably nonfrivolous issues existed.

The district court found that at least two nonfrivolous appellate issues existed in Robbins's case: (1) that the denial of Robbins's attempt to withdraw the waiver of his right to counsel constituted error; and (2) that the inadequacy of the county jail's library deprived him of a meaningful opportunity to prepare his defense. It further noted that there may well be other arguable issues. Robbins also points to several other exhausted, arguably nonfrivolous appellate issues, including prosecutorial misconduct in violation of *Brady v. Maryland*, wrongful denial of Robbins's *Marsden* motions (motions under California law relating to the substitution of counsel), and interference with Robbins's constitutional right to prepare an adequate defense on his own behalf.

[5] *Anders* creates a very low threshold for which arguments counsel must brief for the court. *See United States v. Griffy*, 895 F.2d 561, 563 (9th Cir. 1990); *Lombard v. Lynaugh*, 868 F.2d 1475, 1487 (5th Cir. 1989) (Goldberg, J., concurring). Certainly, counsel need not argue only "winning" arguments. Instead, counsel must bring to the court's attention "anything in the record that might arguably support the appeal." *Anders*, 386 U.S. at 744. For purposes of California law, an issue is "arguable" when it has some potential for success, meaning some possibility of a result requiring reversal or modification of the judgment. *People v. Johnson*, 123 Cal. App. 3d 106, 109 (1981).

[6] The two issues identified by the district court — (1) whether the denial of Robbins's attempt to withdraw the waiver of his right to counsel constituted error; and (2) whether the inadequacy of the county jail's library deprived him of a meaningful opportunity to prepare his defense — are arguably nonfrivolous and should have caused the state appellate court to appoint new counsel for Robbins.[2] As noted by the district court:

> The right guaranteed by the Fourteenth and Sixth Amendments to waive one's right to counsel and proceed in pro per "is premised upon the right of the defendant to make a defense." *Milton v. Morris*, 767 F.2d 1443, 1445-46 (9th Cir. 1985) (citing *Faretta v. California*, 422 U.S. 806, 819-20 (1975)). An incarcerated defendant cannot meaningfully exercise this right without access to tools such as law books. *Id.* at 1446; *Taylor v. List*, 880 F.2d 1040, 1047 (9th Cir. 1989).

The California trial judge's own words — "it's almost impossible as a pro per to prepare yourself a decent defense, especially given the law library" — justify the district court's conclusion that Robbins's inability to prepare an adequate defense was, in the very least, an arguable issue. The California trial judge even told Robbins that "if you are looking up law, you are not going to be able to find it because somebody has torn it out before you got there." There is some potential, had Robbins's appointed counsel raised and vigorously advanced this issue on appeal, that Robbins's conviction would have been reversed.

As the district court noted, the California trial court's treatment of Robbins's request to withdraw his waiver of his right to counsel also raises a serious constitutional question. The district court stated, "[f]airly read, petitioner asked for the appointment of counsel as an alternative to advisory counsel.

[2]Because we conclude that the district court correctly identified at least two arguably nonfrivolous issues, we need not determine whether other arguably nonfrivolous issues exist.

Because the judge failed to even consider whether petitioner was reasserting his right to counsel, it too is a nonfrivolous issue which should have been raised by petitioner's appellate counsel." We agree.

[7] Finally, the State argues that granting relief on Robbins's *Anders* claim violates *Teague v. Lane*. *Teague* held that new constitutional rules cannot be applied retroactively to cases on collateral review unless they fall into one of two narrow exceptions. "[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301. Therefore, we must determine, " 'whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution.' " *Goeke v. Branch*, 514 U.S. 115, 118 (1995) (quoting *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994)).

[8] It is clear that the district court's holding in this case did not involve a new rule. Our discussion above indicates that the outcome of Robbins's case was predetermined by the controlling analysis provided by the Supreme Court in *Anders* and *Penson*, both of which were handed down before Robbins's conviction. The consequences of counsel's failure to raise arguable issues were unambiguously detailed in *Anders*. Application of *Anders* to this case required no extension of precedent or logical interpolation. The facts of Robbins's case almost directly mirror those of *Anders*. In light of these considerations, the *Goeke* test confirms that no "new" constitutional rule was invoked in this case.

IV. *Robbins's Cross-Appeal*

Robbins argues in his cross-appeal that the district court erred when it failed to consider and to rule upon his allegations of constitutional error in the state court trial.

[9] Robbins brought eleven exhausted claims in the district court relating to his trial. Had Robbins not raised the *Anders* issue, the district court would have reached the merits of those claims. Had the district court ruled in Robbins's favor on them, a grant of habeas relief would have required either release or a new trial. The need for a new direct appeal — the remedy granted by the district court — would be obviated by this outcome. Robbins is entitled to have these foundational claims in his habeas petition considered first.

[10] The Eleventh Circuit has, in the exercise of its supervisory authority, directed district courts to rule on all claims raised in a petition for habeas corpus, even if the petition is granted on one claim. *Clisby v. Jones*, 960 F.2d 925, 936 (11th Cir. 1992) (en banc). This has the advantage of avoiding possible remands for consideration of remaining claims if the district court's decision on one claim is reversed. It has the disadvantage of requiring considerable extra work by the district court to decide many claims that may be completely unnecessary, because they will be mooted on appeal.

[11] We have taken a different approach in our circuit. In *Blazak v. Ricketts*, 971 F.2d 1408, 1413 (9th Cir. 1992) (per curiam), we declined to apply the *Clisby* approach to a capital case in which the district court granted the writ on one guilt phase issue without deciding all the remaining guilt phase issues or any of the penalty phase issues. We drew a distinction, however, between a case which granted a petition on a sentencing issue but left unresolved an issue affecting the validity of the conviction. *Id.* at 1413-14. We stated:

> Moreover, unlike habeas grants exclusively on sentencing issues, the grant of a habeas petition because of the constitutional invalidity of a conviction raises concerns that a possibly innocent person has been unjustifiably incarcerated on death row for a number of years. Delaying retrial in such cases, while attorneys fight over a sentence that may no longer exist,

> risks the perpetuation of a monumental injustice, should retrial ultimately result in an acquittal.

Id. at 1414 n.7; *see also Rice v. Wood*, 44 F.3d 1396, 1402 n.10 (9th Cir. 1995). The same policy considerations are involved in this case. Granting the writ only for the ineffective assistance of counsel on appeal leaves the challenges underlying the conviction unresolved. Resolving other issues while leaving challenges to the underlying conviction unresolved potentially can cause grave injustice to defendants like Robbins who, despite alleging constitutional shortcomings in the trial process, must await resolution of a renewed appeal while potentially deserving a retrial and possibly an acquittal.

Penson v. Ohio, cited by California in opposition to Robbins's claim, is inapposite. Penson was an indigent defendant who was convicted of several serious felonies. His appointed appellate counsel filed a letter brief certifying his appeal to be meritless and asking to withdraw. In violation of *Anders*, the Ohio Court of Appeals allowed counsel to withdraw and conducted its own review of the record without the benefit of advocacy or briefing. *Penson*, 488 U.S. at 78. The Ohio court found "several arguable claims," reversed one of his convictions, and then dismissed his appeal. *Id.* at 79. Penson petitioned for a writ of certiorari. The Supreme Court granted the petition and reversed.

[12] *Penson* is unlike the case at bar because it involved the Supreme Court's review of the Ohio appellate court's dismissal of Penson's direct appeal. When the Court recognized that "several arguably meritorious grounds for reversal" existed, it remanded the matter to the Ohio appellate court for further proceedings. *Id.* It was, however, reviewing the direct appeal of a state court action, and not a habeas petition. In this circumstance, the Court explained that it would not "sit in place of the Ohio Court of Appeals *in the first instance* to determine whether petitioner was prejudiced as to any appellate issue." *Id.* at 87 n.9 (emphasis added). In this habeas proceeding the district court will be considering alleged constitutional errors in the defendant's trial that have been exhausted in the state court. Robbins is entitled to have those trial issues considered at this time just as any other habeas petitioner would. The fact that Robbins also presents an allegation of ineffective assistance of appellate counsel is a secondary issue that comes into play only if the district court denies relief for trial errors. That appeal would then be a renewal of the direct appeal as in *Penson* and could encompass any issues that could have been raised on direct appeal.

Because the district court should have addressed the claims of trial error first, it might not have needed to address Robbins's claims of appellate error as well. Because it did address the appellate claims, however, and because it decided those questions correctly, it is in the interest of judicial economy and efficiency to affirm them now. If trial error is found to have occurred and to require vacation of the conviction, the appellate errors will become immaterial. If no such trial errors are found, however, the district court's original order will again become applicable. *Cf. Penson*, 488 U.S. at 88-89 (the actual or constructive denial of assistance of counsel is presumed to result in prejudice); *Lombard*, 868 F.2d at 1487 (formal physical presence of appellate attorney is not appellate counsel; defendant constructively denied assistance of counsel where attorney filed document containing no arguments going to merits of appeal).

V. *CONCLUSION*

The judgment of the district court is **AFFIRMED IN PART** but the case is **REMANDED** to the district court for consideration of whether the alleged constitutional trial errors that defendant raises merit reversal of Robbins's underlying convictions and the granting of a new trial.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LEE ROBBINS,	)	No. CV 94-1157-GHK
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
GEORGE SMITH, WARDEN, et al.	)	
	)	
Respondents.	)	

Pursuant to the Memorandum and Order of the court, IT IS HEREBY ADJUDGED as follows:

(1) the petition for writ of habeas corpus is GRANTED, to the extent that petitioner shall be discharged from custody on the subject conviction unless the California Court of Appeal accepts jurisdiction over petitioner's direct appeal within thirty (30) days; and

(2) respondents shall notify the California Court of Appeal of this court's order.

DATED: This 24th day of October, 1995.

GEORGE H. KING
United States District Judge

FILED
CLERK, U.S. DISTRICT COURT
OCTOBER 24, 1995
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LEE ROBBINS, Petitioner, vs. GEORGE SMITH, WARDEN, et al. Respondents.	)	NO. CV 94-1157-GHK MEMORANDUM AND ORDER

Petitioner, a state prisoner, was convicted of second degree murder and grand theft auto. On February 24, 1994, he filed a petition for writ of habeas corpus with this court. We appointed counsel to represent petitioner, ordered supplemental briefing, and held oral argument on May 9, 1995.

Although petitioner asserts several claims, we reach only the claim of ineffective assistance of appellate counsel. Because we grant this petition on that ground, and this matter is returned to the state courts with instructions that petitioner be granted a direct appeal with new appellate counsel, we do not reach the merits of any of the other alleged errors, even though petitioner has exhausted his state remedies as to those other contentions. See Sherwood v. Tomkins, 716 F.2d 632, 634 (9th Cir.

1983) (potential reversal of petitioner's conviction on state appeal mooting federal claim renders petition premature and subject to dismissal for failure to exhaust state remedies).

DISCUSSION

Petitioner claims he was denied effective assistance of counsel because his appellate attorney did not prepare a proper appellate brief. (Pet., Mem. at 82-88; Traverse at 5-55). Petitioner's attorney submitted a "Wende" brief in which he summarized the facts of the case, but did not raise any specific issues. See People v. Wende, 25 Cal. 3d 436, 436, 158 Cal. Rptr. 839 (1979). Further, the attorney asked the California Court of Appeal to independently review the record. The attorney did not withdraw from the case, but informed the court that he remained available to brief any issue upon invitation of the court. (Traverse, ex. T-4).

Thereafter, the California Court of Appeal ordered petitioner to raise any appealable issues in his own brief. (Return, ex. 3 at 62). Petitioner filed a document claiming that the evidence was insufficient to support his conviction and that the prosecution had suppressed exculpatory evidence. Id. The Court of Appeal reviewed the record, found no arguable issues, and affirmed the judgment. Id.

In Anders v. California, 386 U.S. 738, 738 (1967), the Supreme Court considered the scope of appellate counsel's duty under the Sixth Amendment when such counsel determines that an appeal is without merit. The Court held that if the attorney believes the appeal is frivolous, he or she may request to withdraw. Id. at 744. The request, however, must be accompanied by a brief referring to anything in the record that might arguably support an appeal. Id.

The Anders requirements are designed to assure that a defendant's right to counsel are not violated. McCoy v. Court of Appeals, 486 U.S. 429, 442 (1988). The reviewing court must satisfy itself that the attorney diligently and thoroughly searched the record for arguable claims, and then must determine whether the attorney correctly concluded that the appeal lacked merit. Penson v. Ohio, 488 U.S. 75, 81-82 (1988); McCoy, 486 U.S. at 442. In the Ninth Circuit, a proper Anders brief should identify the arguable issues and include a legal and factual analysis, rather than a simple recitation of the facts. See United States v. Griffy, 895 F.2d 561, 563 (9th Cir. 1990). If arguable issues exist, failure to present them to the court in counsel's brief violates the constitutional requirements of Anders. See id. at 562. Indeed, at oral argument held on May 9, 1995, respondents conceded that if any arguable issues existed which could have and should have been, but were not, raised, there are "serious problems" and prejudice is presumed.[1] Because we find there are arguable issues which counsel failed to raise and brief, we conclude that petitioner's appellate counsel was ineffective due to his failure to meet the Anders standards.[2]

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1. Respondents, of course, contend no arguable issues exist in this case.

2. The court further finds that respondents' argument under Teague v. Lane, 489 U.S. 288 (1989), is without merit. Teague holds that a new rule of criminal procedure cannot be retroactively applied in a habeas proceeding, unless the new rule falls into one of two narrow exceptions. Teague does not apply to new substantive rules. Chambers v. United States, 22 F.3d 939, 942-43 (9th Cir. 1994), vacated on other grounds, 47 F.3d 1015 (9th Cir. 1995).

"A new rule for Teague purposes is one where the result was not dictated . . . at the time the defendant's conviction became final . . . .The question is whether a state court considering the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he]

We recognize that the California Court of Appeal reviewed the record and found no issues of merit. We, however, are not bound by that determination. The existence or absence of non-frivolous issues on the record is a mixed question of law and fact which is reviewed de novo on a petition for writ of habeas corpus. See Sumner v. Mata, 455 U.S. 591, 597-98 (1982), vacated on other grounds, 464 U.S. 957 (1983). More importantly, our disagreement with the California Court of Appeal is not disrespectful because that court's determination was hampered by the inadequate brief prepared by counsel. Indeed, the reasoning behind the Anders rule is to ensure that counsel actually conducted a thorough review of the record. But, the California Court of Appeal was denied the opportunity to make such a determination with the aid of ready references to the record and legal authorities cited by counsel. Therefore, we review the record de novo for arguable issues.

An appeal as a matter of law is frivolous where none of the legal points are arguable on their merits. Neitzke v. Williams, 490 U.S. 319, 325 (1989) (citing Anders v. California, 386 U.S. 738, 744 (1967)). The parties are not in disagreement that for present purposes we can use the standard of an "arguable" issue as set forth in People v. Johnson, 123 Cal. App. 3d 106, 111-12, 176 Cal. Rptr. 390 (1981), cert. denied, 457 U.S. 1108 (1982). To be "arguable," an issue must be one which, in counsel's

seeks was required by the Constitution." Goeke v. Branch, 115 S. Ct. 1275, 1277 (1995) [internal quotations and citations omitted].

In the instant case, the rule being applied in petitioner's case is substantive, not procedural. Even if the issue is deemed to be procedural, Anders clearly sets forth what appellate counsel and the appellate court must do. Further, this court is only applying the settled law of Anders, not an extension or modification thereof, and the standards therein as required before petitioner's state conviction became final.

professional opinion, is meritorious.[3] Id., 123 Cal. App. 3d at 109, 176 Cal. Rptr. at 391. Also, if the issue is successful on appeal and is resolved favorably to the appellant, the result must reverse or modify the judgment.[4] Id.

We need not identify each issue that might be arguable. Nor do we mean to suggest that only the issues discussed below are arguable. But, for present purposes, to see whether Anders was violated and prejudice presumed, we discuss only the following two examples which should have been, but were not, presented in petitioner's appellate brief. Moreover, we do not purport to resolve the merits of any of these issues nor intimate that they will necessarily result in success on appeal, as that is not the appropriate standard of review on this habeas petition.

I. Adequacy of the Law Library

The right guaranteed by the Fourteenth and Sixth Amendments to waive one's right to counsel and proceed in pro per "is premised upon the right of the defendant to make a defense." Milton v. Morris, 767 F.2d 1443, 1445-46 (9th Cir. 1985) (citing Faretta v. California,

3. Although respondents say there is no such thing as an arguable but non-meritorious claim, we find it is essentially a matter of semantics. Viewing an issue from counsel's ability to argue it in good faith with some potential for prevailing is not to say that it will necessarily achieve success. No one is suggesting that only issues which ultimately prevail are arguable. Rather, all that is required is that an issue has a reasonable potential for success.

4. Because we do not purport to decide the merits of any arguable issues, we also defer to the state appellate court to decide the merits of this second prong. We are satisfied for present purposes that at least some of the arguable issues, if they were decided in petitioner's favor, would have the effect of ultimately affecting the result of his appeal.

422 U.S. 806, 819-20 (1975)). An incarcerated defendant cannot meaningfully exercise this right without access to tools such as law books. Id. at 1446; Taylor v. List, 880 F.d (sic) 1040, 1047 (9th Cir. 1989) (same).

The state trial judge was aware of the problems that petitioner was going to encounter with the law library. Indeed, the court warned petitioner, "if you are looking up law, you are not going to be able to find it because somebody has torn it out before you got there." (Aug. RT 19).[5] The court further told petitioner, "it's going to be a real mess for you. You are going to regret this for a long time . . . [because of] your fellow prisoners down in the county jail who have virtually destroyed the law library." (Aug. RT 20). Moreover, the court commented, "it's almost impossible as a pro per to prepare yourself a descent [sic] defense, especially given the law library." (Aug. RT 21).

It is true that the court may not have known exactly what materials petitioner would search out in the law library. In murder cases, however, there are common issues that a defendant will need to research, and by exercising his right to proceed in pro per, petitioner was not required to subject himself to the possibility that, through circumstances wholly beyond his control, he would be unable to prepare his defense. Milton, 767 F.2d at 1445.

Given this state of the record, we conclude that petitioner's inability to prepare an adequate defense was at least an arguable issue. Moreover, the "brief" filed by petitioner's appellate counsel did not even mention these circumstances in the purported recitation of the facts.[6]

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5. "RT" refers to the Reporter's Transcript.

6. Even if appellate counsel thought this argument and appeal were without merit, he still had a duty under Anders to advise the court of anything in the record which might arguably support the appeal.

II. Counsel

A. Advisory Counsel

Petitioner claims that he attempted to withdraw his waiver of counsel and request advisory counsel, or in the alternative, counsel. (Pet., Mem. at 38, 41).

On August 9, 1990, petitioner stated to the court, "I would like to have the assistance of counsel at the trial. I am not real good at public speaking. I am doing okay as far as the law work and stuff. Obviously, I am not a lawyer, but I need somebody to help me present the case." (Pet., ex. E, transcript dated Aug. 9, 1990, at 23). He further stated, "I do need some help presenting the evidence at the trial. I know the court is aware of the recent case laws in reference to appointing co-counsel and advisory counsel, so I don't need to quote that to the court; but I am asking for the assistance of counsel to help me present my defense." Id. at 24.

Prior to the August 9th hearing, petitioner had requested advisory counsel three times. (Aug. RT 18-20, 24-25; Pet., ex. E, transcript dated April 16, 1990, at 3-4, transcript dated July 13, 1990, at 6). The court denied these requests. (Aug. RT at 23-25; Pet., ex. E, transcript dated April 16, 1990, at 3, transcript dated July 13, 1990, at 6).

From the record, some of petitioner's request (sic) for advisory counsel may be considered ambiguous. It does not appear, however, that the judge attempted to clarify these requests. We recognize that petitioner does not have a constitutional right to advisory counsel. United States v. Kienenberger, 13 F.3d 1354, 1356 (9th Cir. 1994). Petitioner, however, does have the right to a considered exercise of judicial discretion. People v. Bigelow, 37 Cal.

3d 731, 742, 209 Cal. Rptr. 328, 333-34 (1984) (citing People v. Mattson, 51 Cal. 2d 777, 797, 336 P.2d 937 (1959) (the appointment of advisory counsel is within the sound discretion of the trial judge who is in the best position to appraise the situation)).

On these facts, it is unclear whether the judge focused on the proper legal standard. At the hearing held on January 24, 1990, the court responded to petitioner's request for advisory counsel by stating, "[t]he problem is you either get to go pro per or you have a lawyer." (Aug. RT 19). This is an apparent error of law. There would never be advisory counsel if a defendant could only proceed pro per or with a lawyer. Indeed, California courts frequently exercise their discretion to appoint advisory counsel. Bigelow, 37 Cal. 3d at 742, 209 Cal. Rptr. at 334. The trial judge, therefore, was at least required to exercise his discretion, especially given that petitioner was charged with murder.

B. Primary Counsel

Moreover, it is also arguable that petitioner was also requesting primary counsel. Fairly read, petitioner asked for the appointment of counsel as an alternative to advisory counsel. See United States v. Robinson, 913 F.2d 712, 718 (9th Cir. 1990), cert. denied, 498 U.S. 1104 (1991) (Sixth Amendment rights attach at critical stages, such as a motion for new trial or sentencing, even though a defendant had previously waived his right to counsel and represented himself at trial); Menefield v. Borg, 881 F.2d 696, 698 (9th Cir. 1989) (same). Because the judge failed to even consider whether petitioner was reasserting his right to counsel, it, too, is a non-frivolous issue which should have been raised by petitioner's appellate counsel.[7/]

7. We reiterate that it is unnecessary for us to inquire into further violations of Anders because, as respondents concede, if there are any arguable issues, prejudice is presumed.

CONCLUSION

IT IS ADJUDGED that the petition for writ of habeas corpus is GRANTED, to the extent that petitioner shall be discharged from custody on the subject conviction unless the California Court of Appeal accepts jurisdiction over petitioner's direct appeal within 30 days; respondents shall notify the California Court of Appeal of this court's order.

Dated: This 24th day of October, 1995

GEORGE H. KING
United States District Judge

APPENDIX D

SUPREME COURT
FILED
OCTOBER 21, 1992
ROBERT WANDRUFF CLERK
DEPUTY

Second Appellate District, Division Four, No. B069441
S028833

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

LEE ROBBINS, Petitioner

v.

LOS ANGELES COUNTY SUPERIOR COURT, Respondent
THE PEOPLE, Real Party In Interest

Petition for review DENIED.

GEORGE
Acting Chief Justice

SUPREME COURT
FILED
SEPTEMBER 29, 1993
ROBERT WANDRUFF CLERK
DEPUTY

ORDER DENYING WRIT OF HABEAS CORPUS

No. S033312

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

IN RE LEE ROBBINS

ON

HABEAS CORPUS

Petition for writ of habeas corpus DENIED on the merits.

LUCAS
Chief Justice

SUPREME COURT
FILED
JANUARY 26, 1994
ROBERT WANDRUFF CLERK
DEPUTY

ORDER DENYING WRIT OF HABEAS CORPUS

No. S036062

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

IN RE LEE ROBBINS

ON

HABEAS CORPUS

Petition for writ of habeas corpus DENIED. (See In re Dixon (1953) 41 Cal.2d 756, 759.)

LUCAS
Chief Justice

APPENDIX E

COURT OF APPEAL - SECOND DIST.
FILED
DECEMBER 12, 1991
ROBERT N. WILSON, CLERK

NOT FOR PUBLICATION IN
THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,	)	No. B054733
	)	
Plaintiff and Respondent,	)	(Super.Ct.No. A481636)
	)	
v.	)	
	)	
LEE ROBBINS,	)	
	)	
Defendant and Appellant.	)	
	)	

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert W. Armstrong, Judge. Affirmed.

David H. Goodwin, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance on behalf of the People, Plaintiff and Respondent.

Lee Robbins appeals from the judgment entered following a jury trial that resulted in his conviction of second degree murder with the use of a firearm and grand theft of an automobile. (Pen. Code, §§ 187, 487, subd. 3,

12022.5, subd. (a).) He was sentenced to 17 years to life in state prison. We appointed counsel to represent him on this appeal.

After examination of the record, counsel filed an "Opening Brief" in which no issues were raised. On October 28, 1991, we advised appellant that he had 30 days within which to personally submit any contentions or issues which he wished us to consider. In a six-page handwritten document filed November 15, 1991, appellant claims that the evidence is insufficient to support his conviction and he was denied due process by the People's suppression of exculpatory evidence. These claims find no support in the record.

We have examined the entire record and are satisfied that appellant's attorney has fully complied with his responsibilities and that no arguable issues exist. (People v. Wende (1979) 25 Cal.3d 436, 441.)

The judgment is affirmed.

NOT FOR PUBLICATION IN
THE OFFICIAL REPORTS

COOPER, J.*

We concur:

WOODS (Arleigh), P.J. EPSTEIN, J.

*Assigned by the Chairperson of the Judicial Council.

APPENDIX F

FILED
SEPTEMBER 24, 1998
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEE ROBBINS, Petitioner-Appellee, v. GEORGE SMITH, Warden, California Department of Corrections, Respondent-Appellant.	)	No. 95-56640 D.C. No. CV-94-01157-GHK
LEE ROBBINS, Petitioner-Appellant, v. GEORGE SMITH, Respondent-Appellee.	)	No. 96-55063 D.C. No. CV-94-01157-GHK ORDER

Before: HUG, Chief Judge, PREGERSON and REINHARDT,
Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

The motion for clarification and for a stay of the mandate and for leave to file a supplemental rehearing petition is DENIED.

FILED
OCTOBER 26, 1998
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEE ROBBINS, Petitioner-Appellee, v. GEORGE SMITH, Warden, California Department of Corrections, Respondent-Appellant.	)	No. 95-56640 D.C. No. CV-94-01157-GHK
LEE ROBBINS, Petitioner-Appellant, v. GEORGE SMITH, Respondent-Appellee.	)	No. 96-55063 D.C. No. CV-94-01157-GHK ORDER

Before: HUG, Chief Judge.

The "Motion to Stay the Mandate to Permit Respondent to File a Petition for Writ of Certiorari" is GRANTED.

FILED
DECEMBER 2, 1998
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEE ROBBINS, Petitioner-Appellee, v. GEORGE SMITH, Warden, California Department of Corrections, Respondent-Appellant.	)	No. 95-56640 D.C. No. CV-94-01157-GHK
LEE ROBBINS, Petitioner-Appellant, v. GEORGE SMITH, Respondent-Appellee.	)	No. 96-55063 D.C. No. CV-94-01157-GHK ORDER

Before: HUG, Chief Judge.

The Motion to Extend the Stay of Mandate an additional 30 days is GRANTED.

APPENDIX G

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	2d Crim. No. B054733
	)	Superior Court
Plaintiff and Respondent,	)	No. A 481636
vs.	)	
LEE ROBBINS,	)	
Defendant and Appellant,	)	

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
HONORABLE ROBERT W. ARMSTRONG,
JUDGE PRESIDING

APPELLANT'S OPENING BRIEF

REQUEST FOR INDEPENDENT REVIEW OF
RECORD PURSUANT TO
PEOPLE v. WENDE (1979) 25 Cal. 3d 436

David H. Goodwin
P.O. Box 93579
Los Angeles, CA 90093-0579
(213) 666-9960

Attorney for Appellant

STATEMENT OF THE CASE

This is an appeal pursuant to Penal Code Section 1237 from a judgment of conviction of violation of one count each of Penal Code Section 187(a)[1] (murder) and 487(3) (Grand theft of an automobile).

Appellant was charged by information with one count of violation of Section 187(a) and one count of Section 487(3). It was further alleged that in the commission of the murder appellant personally used a firearm within the meaning of Sections 1203.06(a)(1) and 12022.5 (CT 106-107).

On December 19, 1989, appellant was arraigned in the Superior Court for the County of Los Angeles, Department SE J, before the Honorable J. A. Torribio. At that time Appellant entered a plea of not guilty (CT 108).

On December 20, 1989, Judge Torribio suspended proceeding pending a determination of appellant's competency pursuant to § 1368 (CT 109).

On March 1, 1990, the Honorable C. Robert Simpson, presiding in Department SE J, found appellant competent to stand trial, and proceedings were resumed. On that date the court also denied appellant's motion pursuant to People v. Marsden (1970) 2 Cal.3d 118 (CT 143).

On March 7, 1990, Judge Simpson denied another Marsden motion, and granted appellant's request to proceed in propria persona (CT 144).

On August 17, 1990, the cause was called to trial before the Honorable R. Armstrong, presiding in the Superior Court for the County of Los Angeles, Department SE F (CT 200).

1. All further undesignated statutory references are to the Penal Code.

Superior Court for the County of Los Angeles, Department SE F (CT 200).

On August 22, 1990, the jury returned a verdict of guilty of one count second degree murder and one count of grand theft of an automobile. It was further found that in the commission of the murder appellant personally used a firearm within the meaning of Sections 12022.5(a) and 1203.06(a)(1) (CT 248-251).

On September 5, 1990, Judge Armstrong sentenced appellant as follows: For Count 1, a sentence of fifteen years to life imprisonment, plus 2 years pursuant to Section 12022.5 for a total of seventeen years to life. For Count 2, the mid term sentence of two years imprisonment, to be served consecutively to the sentence imposed for Count 1. However, the sentence for Count 2 was stayed, that stay to become permanent pending the completion of the sentence for count 1. Appellant was given credit for 658 days (CT 251-252).

On September 6, 1990, a Notice of Appeal was filed bringing this case before this Court (C.T. 253-254).

STATEMENT OF THE FACTS

Alvin York Curtis, lived next door to Spaulding (the decedent in this case) during the summer of 1988[2]. During that summer, appellant was living in the converted garage of Spaulding's residence (RT 75-76, 91). At about 6:30 p.m. on December 31, 1989, Mr. Curtis heard two sets of gunshots, separated from each other by a pause of a couple seconds. Each set consisting of several shots, and each set sounding distinct from the other (RT 76-78). At that time Mr. Curtis thought that the sounds were gunshots from New Year's Eve revelers (RT 78-79).

2. Unless otherwise indicated all events referred to herein occurred on December 31, 1988.

Spaulding had frequent arguments with his wife, and at one time he was arrested for assaulting her. (RT 81, 89-90).

Dona Medina, another neighbor of the victim, also heard gunshots at that time, and described them as having two distinct sounds, the first three having a sharp sound, and the next four or five shots having a more muffled sound. (RT (84-85).

Mrs. Medina knew of one occasion where a woman claimed that Spaulding had beaten her because she would not sleep with him (RT 89). Mrs. Medina also testified that on one occasion Spaulding's house was vandalized, and Spaulding then made a phone call from her house, telling the person he called that he knew that "Lee" had been the one who vandalized his house (RT 89).

Maria Romero, another neighbor of Spaulding heard the shots (RT 95). Shortly after hearing the shots she saw a man standing in front of her house. The person told her that he was looking for his dog who ran away after being scared by fireworks (RT 96-98).

Mrs. Romero and her daughter then went to the Fayva shoe store where they purchased some shoes. The receipt from the shoe store indicated the time of purchase as 6:47 p.m. (RT 98, 100). Mrs. Romero was unable to identify the man who was looking for the dog, although she described him to the police as being five feet six inches to five feet eight inches, 25 to 30 years old, and having dark short curly hair (RT 102, 104-105).

Stanley Curatola, Spaulding's roommate, testified that he left their residence on New Year's Eve before noon (RT 110-111), and spent the day with a variety of friends at various bars and restaurants. He returned to his residence, along with some of his friends from the bars, at about 8:00 (RT 111-114). Returning home he found that a rear window had been broken. Opening the curtain to the window he saw Spaulding lying on his face

on the floor in a pool of blood (RT 114-116). Spaulding's gun was on the floor next to him. Curatola told his friend to call the police, and waited outside until they arrive (RT 117).

Curatola testified that he knew that Spaulding had been having an ongoing dispute with another roommate, whom Curatola eventually discovered to be appellant. (RT 118, 120)

Arriving at the Spaulding residence at about 11:00 p.m., Deputy Sheriff Cox observed a Smith and Wesson .38 caliber revolver (People's Exhibit 9) with five expended rounds lying next to Spaulding's body (RT 170, 172-173, 176). Bullet holes were observed in the door to the service porch, going from the inside of the residence to the outside, and the window on that door had been shattered (RT 173-174).

When Deputy Cox interviewed appellant after his arrest, appellant admitted being in the area of the Spaulding residence around dusk on December 31, 1988 (RT 180). In that statement appellant stated that he was on his way home when he stopped to let his dog relieve itself. He lost sight of the dog, and had asked a "Mexican couple" at the corner of Claretta and Gradwell if they had seen it. He later found the dog in a parking lot across the street (RT 180-181).

Richard Lee, appellant's brother-in-law testified that in December of 1988, appellant was living in a trailer in the backyard of Lee's residence (RT 125). Some time in mid December, Mr. Lee asked appellant to stay at another property he owned in Santa Fe Springs, and watch that property for Lee, but that appellant had returned to Mr. Lee's residence on at least one occasion in January of 1989, and that appellant would have had access to Mr. Lee's garage (RT 125-126, 141-142).

As part of a firearm collection, Mr. Lee owned a .45 caliber Colt Commander automatic pistol (People's

Exhibit 3). That weapon was normally kept in a gun safe in his garage. (RT 126-128).

Lee testified that appellant had access to the garage. Although the gun safe was usually locked, Mr. Lee kept the lock set so that he only had to roll the combination to zero so that he had easy access to the safe. Mr. Lee was sure that appellant had seen him open the safe in that manner (RT 128-129).

Some time in mid December this gun disappeared from Mr. Lee's possession. It later reappeared in mid January. Mr. Lee did not know where the weapon was during this time (RT 129, 143).

Mr. Lee testified that another gun had also disappeared from his collection in late November or early December, when he had taken it to a gun shop in Riverside, accompanied by appellant, to have some work done on the gun. (RT 129-131)

Mr. Lee further testified that he had loaned appellant People's Exhibit 3 earlier in October of 1988, and appellant had returned the gun on November (RT 132-133).

Mr. Lee testified that when the police initially visited him in January of 1989 he had lied to them, telling them that he only had one .45 automatic, when, in fact, he had five. Mr. Lee had taken the weapons to his father's house, where he had left them for a month or two, because he was concerned that if the police took the weapons they would not return them (RT 133-134).

Mr. Lee further testified that the police visited him again in October of 1989, and at that time he admitted that he lied earlier. He also gave them several .45 automatics, including People's Exhibit number 3. At the time that he handed over People's Exhibit number 3, it had an electron sight on it that had been put on the gun after he had retrieved it from his father's house (RT 134-136).

Mr. Lee testified that on January 10, 1989, appellant had asked him if he had been interviewed by the police. He told Robbins not to let the police have the gun, because he was afraid that the police would dummy up ballistics tests and frame him for Spaulding's murder (RT 145-146).

At that time appellant asked Lee for a vehicle. Lee offered to let appellant use a Blazer that was at Lee house. Lee and appellant went to Lee's place of work in a truck that Lee was borrowing from his father. Lee left the keys to that truck of his office desk, and later discovered that the keys, the truck and appellant were missing (RT 146-148).

Some time later the truck was discovered in Arizona near the New Mexico border. Lee had not give appellant permission to take the truck (RT 148-149).

On January 7, 1989, Deputy Cox spoke to Lee and requested permission to search the trailer on Lee's property that appellant had been staying in. (RT 186-187). On January 12th, Cox again went to Lee's residence where he searched the garage (RT 192).

On October 3, 1989, Cox again spoke to Lee, and Lee informed Cox that he had been lying to Cox about the number of guns that he had. Lee then handed over all his .45s to Cox, and Cox had the weapons test fired. He returned all of the weapons to Lee, and after the test results were complete he re-obtained People's Exhibit 3 (RT 195-197).

Deputy Cox further testified that the police had removed a piece of carpeting from the Spaulding residence because they had initially thought that it was blood stained. However, that carpeting was destroyed when tests determined that the stain was not blood (RT 205-206).

He testified that because of the possibility that the stain on the carpet may have been blood and the fact that one weapon had apparently been fired from inside

the house to the outside, the initial bulletin that they had issued mentioned that the suspect might have been wounded (RT 206-207).

It was stipulated that appellant had never received any gunshot wounds (RT 223-224)

Dr. Sara Reddy, a deputy medical examiner for the Los Angeles County coroner's office, performed the autopsy on Spaulding. She determined that Spaulding had been shot five times, and gave multiple gunshot wounds as the cause of death (RT 219). She testified that death would have been "very quick" (RT 221).

On the afternoon of December 31, 1988, appellant was visiting Pat Cano in Hawaiian Gardens (RT 228-229, 269-270). At that time he showed Vincent Nylin, Cano's boyfriend, a .45 Colt commander and a TEC-9 nine-millimeter revolver (RT 237-239).

Deputy Van Horn of the scientific Services Bureau, recovered a .38 caliber Smith and Wesson revolver, several expended .45 Caliber cartridge cases, and bullets from a .45 caliber and a. 38 caliber gun (RT 242-243).

The .45 caliber cartridge casings were found outside the side door to the residence (RT 246). Two .45 caliber bullets were recovered from the rear wall (RT 247-248). Four .38 caliber bullets were found in the area around the rear door (RT 249).

After testing the weapons involved, Deputy Van Horn concluded that the .38 caliber bullets found were fired from the Smith and Wesson recovered at the scene. He further found that the .45 caliber bullets recovered from the scene and the bullets given to him by the Coroner's office were all fired from People's Exhibit Number 3 (RT 254, 256-257).

In Deputy Van Horn's opinion, the bullets from the .45 caliber were fired from outside the house to the inside, while the bullets from the .38 caliber were fired from the inside to the outside (RT 264).

ARGUMENT

APPELLANT REQUESTS THAT THIS COURT INDEPENDENTLY EXAMINE THE ENTIRE RECORD ON APPEAL

Pursuant to People v. Wende (1979) 25 Cal. 3d 436, counsel requests that this court independently review the entire record on appeal for arguable issues.

Present counsel has advised appellant that appellant may file a supplemental brief with the court within 30 days and may request the court to relieve present counsel. Present counsel remains available to brief any issues(s) upon invitation of the court. (See Declaration attached hereto.)

DATED: October 1, 1991 Respectfully submitted,

David H. Goodwin
Attorney for Appellant

DECLARATION OF DAVID H. GOODWIN
IN SUPPORT OF REQUEST FOR
INDEPENDENT JUDICIAL REVIEW OF
THE ENTIRE APPELLATE RECORD

I, David H. Goodwin, declare as follows:

I am the attorney appointed to represent appellant, Lee Robbins, in his appeal following judgment of conviction for violation of Penal Code §§ 187(a) and 487(3).

I have reviewed the entire record on appeal, consisting of the Clerk's Transcript (1 volume), the Reporter's Transcript (1 volume), and the Augmented Reporter's Transcripts (1 volume); examined the superior court file and exhibits from appellant's trial; and discussed appellant's case with trial counsel.

I have written to appellant at his current address, Lee Robbins, E-69926, 1-1A-30, P.O. Box W, Repressa, Ca 95671, explaining my evaluation of the record on appeal and my intention to file this pleading. I have also informed him of his right to file a supplemental brief. I have sent appellant the transcripts of the record on appeal and a copy of this brief.

I do not at this time move to withdraw as counsel of record for appellant and I remain available to brief any issues that the Court requests. I have also advised appellant that he may request this court to relieve me.

I declare under penalty of perjury that the foregoing is true and correct and that I signed this declaration on October 1, 1991, at Los Angeles, California.

_____
David H. Goodwin

PROOF OF SERVICE BY MAIL (C.C.P. SEC. 1013.A, 2015.5)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of the aforesaid county; I am over the age of eighteen years and not a party to the within entitled action; my business address is

P. O. Box 93579, Los Angeles, Ca 90093-0579

On October 1 1989 I served the within Statement by Counsel on Appeal Pursuant to People v. Wende on the interested parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as follows:

The Attorney General
300 South Spring St.
Room 500
Los Angeles, Ca 90013

Hon. Robert W. Armstrong
Superior Court, Dept. SE F
12720 Norwalk Blvd.,
Norwalk, Ca 90650

District Attorney's Office
12720 Norwalk Blvd., Room 201
Norwalk, Ca 90650

Lee Robbins, E-69926
1-1A-30
P.O. Box W
Repressa, Ca 95671

Executed on October 1, 1991, at Los Angeles, California
I declare under penalty of perjury that the foregoing is true and correct.

_____
DAVID H. GOODWIN

APPENDIX H

Declaration of David Goodwin

I, David Goodwin, hereby declare as follows:

1. I am a attorney licensed to practice law in California.
2. I was the appointed attorney in People v. Robbins, Court of Appeal No. B054733.
3. It has been 39 months since I filed the brief in this matter, and I do not recall all of the specifics. However, to the best of my recollection, appellant pointed out many issues to me. I attempted to consider most of the issues he mentioned. As to some, I thought they not were meritorious on their face. As to the others that I attempted to research I thought they were not meritorious.
4. Prior to the filing a brief, I filed with consulted with California Appellate Project, and received their permission to file a Wende brief.

I declare under penalty of perjury, under the laws of the United States, that the foregoing is true and correct.

Executed: (Date illegible)

_____
David H. Goodwin

APPENDIX I

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Jesus F. Marroquin, Petitioner, v. K.W. Prunty, Warden, Respondent.	)	CV 95-2477-KN (SH) ORDER Re: Habeas Corpus Petition

Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court has reviewed the Final Report and Recommendation of the United States Magistrate Judge. The Court declines to follow the recommendations of the Magistrate Judge and hereby **DENIES** the Petition.

Petitioner alleges that the California Court of Appeal's failure to request further briefing from his appellate counsel and its denial of his request for new counsel to brief his appellate issues prior to ruling on the merits violated his Sixth and Fourteenth Amendment right to counsel. The United States Supreme Court in Penson

v. Ohio, 488 U.S. 75, 80 (1988) held that if there are nonfrivolous issues on appeal, the appellate court "must, prior to the decision, afford the indigent the assistance of counsel to argue the appeal." In California, appellate counsel for an indigent may file a brief containing only a statement of the facts and the applicable law if counsel believes that there are no meritorious issues on appeal. People v. Feggans, 67 Cal.2d 444 (1964). If appellate counsel files such a brief, the appellate court "must then itself conduct a full examination of all the proceedings to decide whether the case is wholly frivolous . . . . [O]nly after the appellate court finds no nonfrivolous issues for appeal, may the court proceed to consider the appeal on the merits without the assistance of counsel." Penson, supra, at 80 (internal quotations and brackets omitted).

In the instant case, Petitioner was appointed appellate counsel. Counsel filed a "no-merit brief" pursuant to Feggans, having determined that there were no meritorious issues on appeal. The California Court of Appeal then made its own independent determination that the appeal was frivolous. The Court of Appeal in its opinion did address the merits of one issue: the trial court's denial of Petitioner's motion to exclude evidence of a prior felony conviction. However, although the appellate court addressed the merits of this issue (and determined that it was proper to admit such evidence), the court carefully pointed out that a "review of the record reveals that, despite extensive argument on the subject and the trial court's denial of the motion to exclude, the prosecutor never introduced the conviction into evidence." Thus, while the admission of the prior felony conviction would have been an arguable issue on appeal, the fact that the conviction was never admitted rendered the issue moot. The court went on to state that "Defendant's other contentions are equally unsupported by the record" and "no arguable issues exist."

Having conducted its own independent review of the record and determined that all issues raised on appeal were frivolous, the Court of Appeals had no obligation to either request further briefing from Petitioner's appellate counsel, or appoint new appellate counsel for Petitioner to brief the issues on appeal prior to ruling on the merits of Petitioner's appeal. The Court of Appeals fully complied with the requirements of Penson v. Ohio.

Petitioner's assertion that he was denied the assistance of appellate counsel in violation of the Sixth and Fourteenth Amendment has no merit, as Petitioner failed to raise any non-frivolous issues on appeal. The Court therefore **DENIES** the Petition for a Writ of Habeas Corpus.

IT IS SO ORDERED.
DATED:_____

_____
DAVID V. KENYON
UNITED STATES DISTRICT JUDGE